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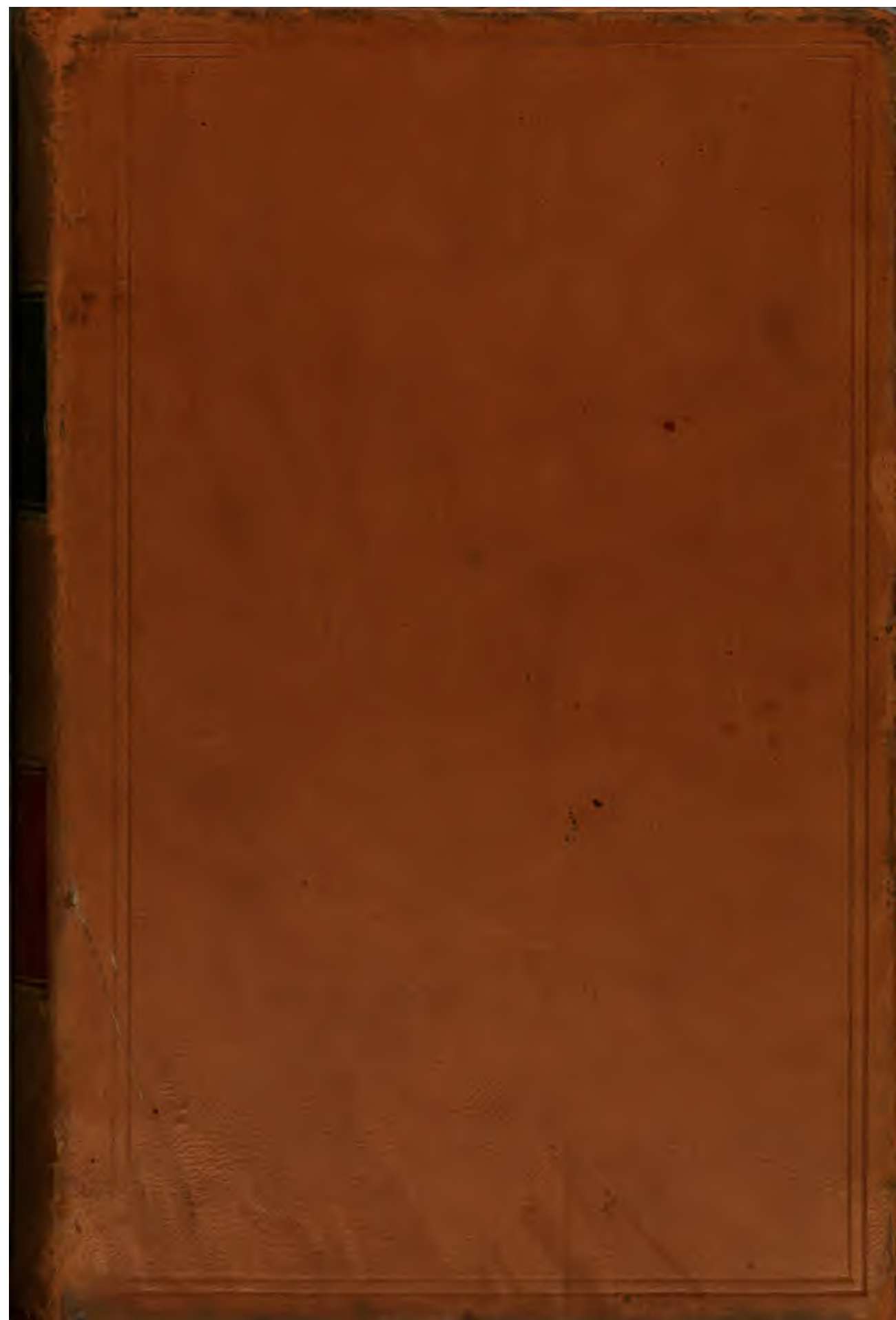
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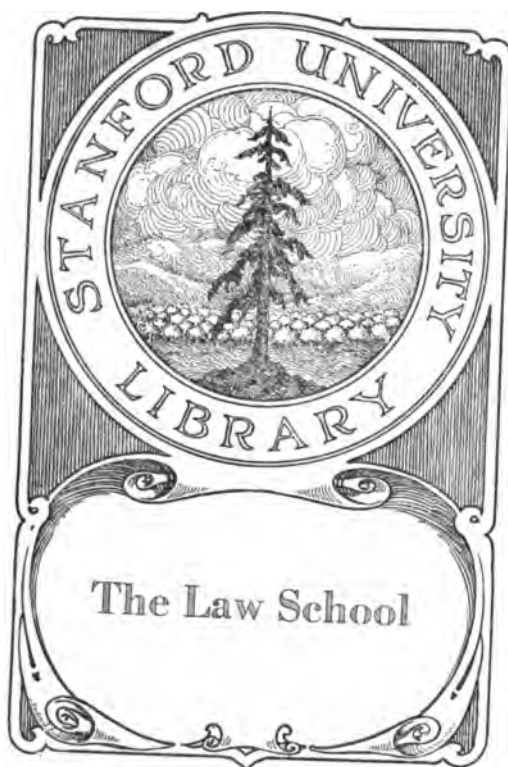
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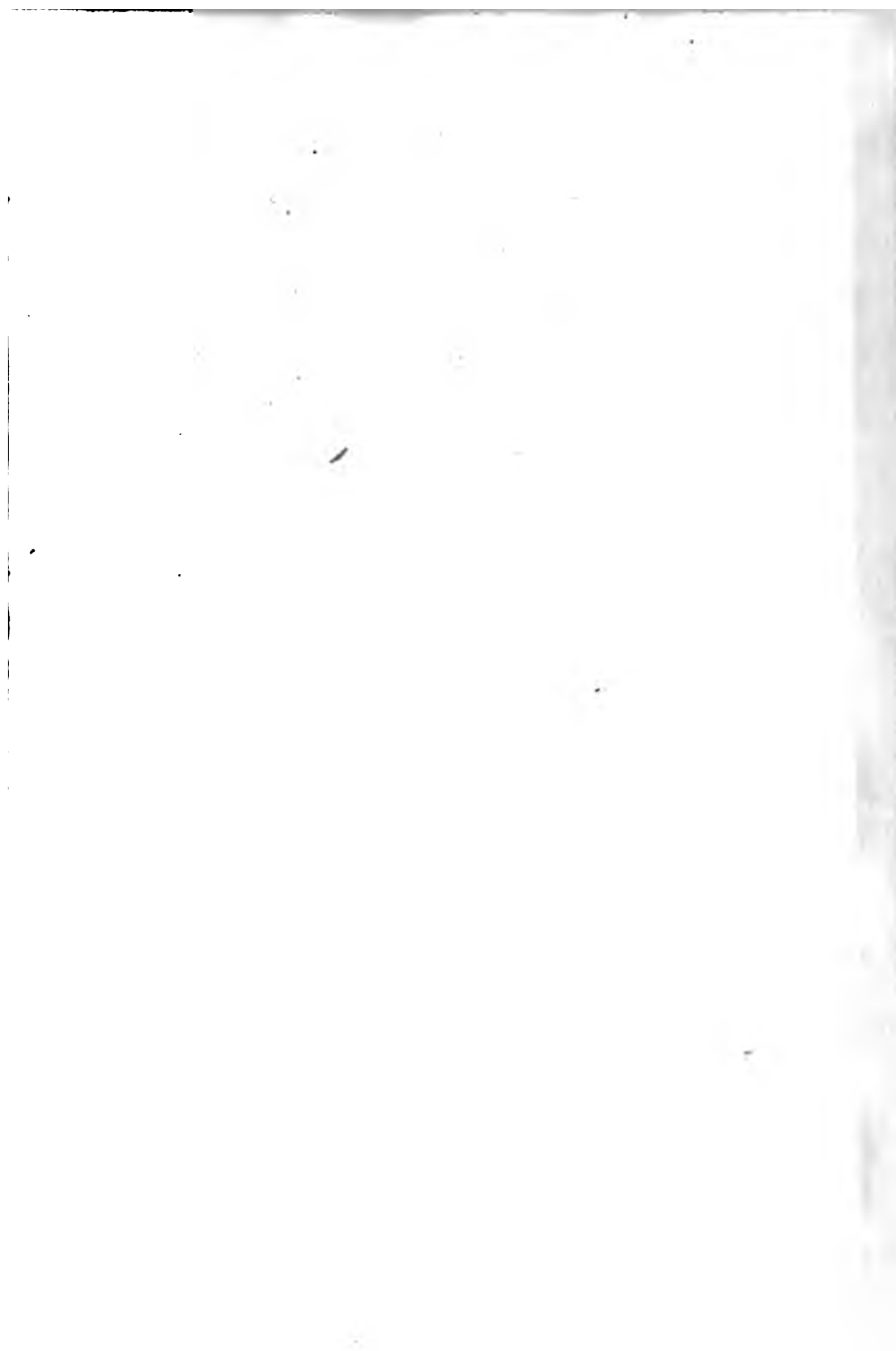
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AMERICAN

RAILROAD AND CORPORATION

REPORTS.

BEING A COLLECTION OF THE CURRENT DECISIONS OF THE COURTS OF
LAST RESORT IN THE UNITED STATES PERTAINING TO THE LAW
OF RAILROADS, PRIVATE AND MUNICIPAL CORPORATIONS, IN-
CLUDING THE LAW OF INSURANCE, BANKING, CAR-
RIERS, TELEGRAPH AND TELEPHONE COMPANIES,
BUILDING AND LOAN ASSOCIATIONS, ETC.

EDITED AND ANNOTATED BY

JOHN LEWIS,

AUTHOR OF "A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES."

VOLUME II.

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CALIFORNIA INSURANCE COMPANY v. UNION COMPRESS COMPANY.

(10 Sup. Ct. R. 365; 133 U. S. 387.)

1. INSURANCE. INSURABLE INTEREST. The defendant issued to the plaintiff, the Compress Company, a policy of insurance "against all direct loss or damage by fire," "on cotton in bales, their own, or held in trust or on commission," while contained in or upon certain specified premises. The policy was not to cover any cotton which should be covered at the time of the loss in whole or in part by a marine policy. The policy was to be void if any changes took place in the possession of the property insured. The plaintiff was engaged in the business of compressing cotton and issued receipts to those depositing cotton for that purpose. Said receipts were surrendered by their owners to certain railroad companies who issued bills of lading therefor in the names of the persons to whom the same was to be consigned, agreeing not to ship the same until compressed by the plaintiff. There was an agreement between the plaintiff and the railroad companies that the former should keep the cotton insured for their benefit after notice of the bills of lading, until delivered to them. The suit was to recover for cotton destroyed by fire while in the possession of the plaintiff on the premises specified in the policy and after bills of lading had been issued therefor by the railroad companies. The fire was claimed to have been caused by the negligence of the railroad companies. There was evidence tending to show that the whole course of business was known to the agent of the insurance company when the policy was issued. The owners of most of the cotton destroyed had made claims against the railroad companies. Some of these claims were in suit and some had been paid after judgment. It was held, first, that the railroad companies had an insurable interest in the cotton and that it was lawful for the plaintiff to insure the cotton in its own name for the benefit of such companies.

2. That the words "held by them in trust" were appropriate and effectual to
VOL. II--1

AMERICAN RAILROAD AND CORPORATION REPORTS.

CALIFORNIA INSURANCE COMPANY v. UNION COMPRESS COMPANY.

(10 Sup. Ct. R. 365; 133 U. S. 337.)

1. **INSURANCE. INSURABLE INTEREST.** The defendant issued to the plaintiff, the Compress Company, a policy of insurance "against all direct loss or damage by fire," "on cotton in bales, their own, or held in trust or on commission," while contained in or upon certain specified premises. The policy was not to cover any cotton which should be covered at the time of the loss in whole or in part by a marine policy. The policy was to be void if any changes took place in the possession of the property insured. The plaintiff was engaged in the business of compressing cotton and issued receipts to those depositing cotton for that purpose. Said receipts were surrendered by their owners to certain railroad companies who issued bills of lading therefor in the names of the persons to whom the same was to be consigned, agreeing not to ship the same until compressed by the plaintiff. There was an agreement between the plaintiff and the railroad companies that the former should keep the cotton insured for their benefit after notice of the bills of lading, until delivered to them. The suit was to recover for cotton destroyed by fire while in the possession of the plaintiff on the premises specified in the policy and after bills of lading had been issued therefor by the railroad companies. The fire was claimed to have been caused by the negligence of the railroad companies. There was evidence tending to show that the whole course of business was known to the agent of the insurance company when the policy was issued. The owners of most of the cotton destroyed had made claims against the railroad companies. Some of these claims were in suit and some had been paid after judgment. It was held, first, that the railroad companies had an insurable interest in the cotton and that it was lawful for the plaintiff to insure the cotton in its own name for the benefit of such companies.

2. That the words "held by them in trust" were appropriate and effectual to

or floating policies, or by policies covering only in excess of specified loss; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, or any part thereof, subject to the conditions of average, this policy shall be subject to average in like manner.

* * * If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

* * * In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth [in the proofs of loss], together with their respective interests therein.' "

The complaint alleges that on the 14th of November, 1887, the plaintiff was engaged in the business of compressing cotton, which it received or held on its own account, or on commission, or in trust for others, at its warehouses and compress buildings, and adjoining sheds and platforms, situated at the foot of Main street, in the city of Little Rock, Ark.; that it had on hand at that date about two thousand eight hundred bales of cotton, delivered to it to be compressed, and belonging to divers parties, the value of which equalled the sum total of the insurance thereon; and that such cotton, whether owned by the plaintiff, or held by it on commission, or in trust for others, was insured against loss or damage by fire in twenty-eight insurance companies, which are named, in the several amounts stated opposite their respective names, amounting in the aggregate to \$142,500, which included the defendant for the sum of \$10,000. It then sets forth the issuing of the policy by the defendant to the plaintiff, a copy of which is annexed to the complaint, and that on the 14th of November, 1887, all the cotton in bales, contained on said premises, and so insured, was destroyed by fire, "together with a large quantity of other cotton in possession of plaintiff at said place, which was not insured by plaintiff."

The complaint then proceeds as follows: "[That at the time that said cotton came to the possession of the plaintiff it was en-

gaged in the business of compressing cotton at its compress in the town of Argenta, opposite Little Rock, and on the north side of the Arkansas river, and that said cotton was deposited with the plaintiff for compression by various owners thereof, who delivered the same at the sheds and yards and adjacent grounds in the said city of Little Rock, as described in said policy, with directions that the same should be transported to said compress by the plaintiff, or some carrier employed for that purpose by it, and that on the receipt of any bales of said cotton by said plaintiff it gave a receipt for the same to the owner thereof, and that, according to a custom known to said depositors, to the plaintiff, and to the St. Louis, Iron Mountain and Southern Railway Company and the Missouri Pacific Railway Company, of which it was a part, and the Little Rock and Memphis Railroad Company, which were common carriers, having and operating railroads of which both Argenta and Little Rock were stations, said owners transferred said receipts to either one or the other of said carriers, and received from said carriers bills of lading for the transportation by said carriers of said cotton to various places to which said cotton was then and there shipped by said owners, with an agreement with said railway companies that said cotton should not be shipped until it had been compressed by the plaintiff. There was a standing and continuing agreement between said plaintiff and said railway companies that the plaintiff should proceed to compress said cotton, and all cotton thus received, and should insure the same, after notice of the execution of said bills of lading by said railway companies, against loss by fire during the time that said cotton should be in the hands of the plaintiff, for the purpose aforesaid, for a price averaging from sixty to sixty-five cents per bale, to be paid by said railway companies, respectively, when said cotton should be compressed and delivered to said railway companies on their cars at Argenta for transportation under said bills of lading, at which time said carriers should surrender to plaintiff the said receipts, issued, as aforesaid, at the time that said cotton was deposited with the plaintiff for compression by the owners, as above stated; that all of said cotton was in the custody of plaintiff at the time of said loss, under and by virtue of said custom and agreement, and that it was lost by the negligence of the servants, agents and employes of said railway companies, and that since

said loss said St. Louis, Iron Mountain and Southern Railway Company has been sued in this court by two of said consignees for the value of part of said cotton above named, to-wit, the York Manufacturing Company and Hazard & Chapin, and said railway company defended said actions on the ground that said loss was not occasioned by the negligence of said railway company, or its servants and employes, and on a trial of said first-named cause it was adjudged by this court that said York Manufacturing Company and said Hazard & Chapin recover from said railway company the value of said cotton sued for, as aforesaid, and that since said adjudication said railway company has paid said judgment, and the value of a large part of the cotton, for which it had issued bills of lading as aforesaid, and that several suits are now pending in this court against said Little Rock and Memphis Railroad Company, brought by the consignee of portions of said cotton, for the recovery of damages for the loss of said cotton by reason of the negligence of said railroad company, which said suits are now pending and undetermined. On said 14th day of November, 1887, the plaintiff had in its possession, at its sheds and premises above mentioned, for purposes of compression, a large amount of cotton, to-wit, over three thousand bales. That of this number two thousand seven hundred bales of cotton were held by this plaintiff for the St. Louis, Iron Mountain and Southern Railway Company and the Little Rock and Memphis Railroad Company. By said contract and agreement between plaintiff and said railroads this plaintiff took out the policies of insurance above set out for the purpose of indemnifying this plaintiff against loss and liability, and the said railroad companies against loss and liability, by reason of the destruction of said cotton while it was being held by plaintiff for purposes of compression. The St. Louis, Iron Mountain and Southern railway has been adjudged, as aforesaid, to pay a large sum of money, to-wit, \$——, and, in addition, has paid a still larger amount because of its liability for such loss, amounting in all, up to this date, to \$72,209.58, and has made demand therefor against the plaintiff for reimbursement of said losses.]” It also avers that the loss by fire on the cotton equalled the insurance on it, and that the plaintiff has performed all the conditions of the policy; and prays judgment for \$10,000, with interest. The defendant

moved to strike from the complaint the words "together with a large quantity of other cotton in possession of plaintiff, at said place, which was not insured by plaintiff," and also the foregoing part included in brackets. It also demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and also demurred separately to that part of it which is so included in brackets, on the ground that the facts therein stated did not tend to constitute a cause of action. The court overruled the said motion, and also the demurrer, and the defendant excepted to both of those rulings. The defendant then filed its answer admitting the issuing of the policy, and that at the fire one hundred and twelve bales of cotton, belonging to one Hanger, and held by the plaintiff in trust for Hanger, were burned, for the loss of which the insurance companies named in the complaint had paid the plaintiff \$4,826.59, in full satisfaction thereof, and of which sum the defendant paid its full portion of the loss.

The answer denies the material allegations of the complaint, and avers that the greater portion of the cotton alleged to have been lost at the fire was received by the plaintiff from the owners thereof after the issuing of the policy; that the cotton burned was first delivered by its owners to the plaintiff, and the plaintiff gave to the owners receipts for it, which provided that the plaintiff should not be liable for the loss of it by fire; that afterward and after the policy was issued, the cotton was sold to various persons, who became its owners, and the Missouri Pacific Railway Company, the Little Rock and Memphis Railroad Company, and the Little Rock, Mississippi River and Texas Railway Company, common carriers of cotton for hire, issued their bills of lading for the same to the purchasers, which provided that the carriers should not be liable for the loss thereof by fire, and at the same time such railroad companies took up the receipts issued by the plaintiff to the original owners, and surrendered them to the plaintiff, whereby the possession of the cotton was changed, contrary to the provisions of the policy, without any consent of, notice to, or knowledge by the defendant; (7) that it is provided in the policy that it shall not apply to or cover cotton which was at the time of loss covered in whole or in part by marine policies, and at that time two thousand one hundred and seventy-two bales of the cotton alleged to have been burned, and of the value

of \$101,973.73, were covered by marine policies, theretofore issued to the respective owners of the cotton; (8) that after the railroads had issued their bills of lading for the cotton, and before and at the time of the fire, it was kept in a grossly negligent manner in a dangerous public place, without being covered or sprinkled, and but a few feet from a railroad track, where locomotives of the Missouri Pacific and the St. Louis, Iron Mountain and Southern railroads, emitting sparks, were constantly passing, by which sparks the fire was kindled, and the cotton was destroyed by a fire which occurred in broad daylight, at about four o'clock P. M., and which fire those two railroad companies, by the use of ordinary care, could have extinguished by removing the bales first ignited, or by putting out the fire by water from the hydrants which were close by; and that none of the cotton was destroyed by the negligence of the Little Rock and Memphis Railroad Company or its employes. The plaintiff demurred to certain paragraphs of the answer, and, among them, paragraphs 7 and 8, as not stating facts sufficient to constitute a defense. The court overruled such demurrer as to two of the paragraphs and sustained it as to paragraphs 7 and 8; to which latter ruling the defendant excepted. Thereupon the case was tried by a jury, which found a verdict for the plaintiff for \$9,491.96, on which a judgment was accordingly entered, to review which the defendant has brought a writ of error.

The first four assignments of error on the part of the defendant relate to the overruling of its motion to strike out part of the complaint, the overruling of its demurrer to the complaint, and to part thereof, and the sustaining of the demurrer of the plaintiff to paragraphs 7 and 8 of the answer. At the trial, the plaintiff offered evidence tending to prove that it was engaged in the business of compressing cotton at the town of Argenta, which is on the north bank of the Arkansas river, directly opposite the city of Little Rock; that it received cotton for compression at Argenta and also at the premises described in the policy, at Little Rock; that for cotton received at either place it issued receipts to the depositors, red receipts at Argenta, and green receipts at Little Rock, a blank form of which, as it appears in the bill of exceptions, if filled out, would read thus: "Little Rock, Arkansas, Nov. 1, 1887. Received by the Union Compress Company.

From John Smith. Account of John Doe. For compression. Storage after ten days will be charged. Not responsible for any loss by fire. Marks X, Y, Z. No. bales cotton, 65. Richard Roe, superintendent;" that the holders of such receipts took them to the freight offices of one or the other of the two railway companies, the Missouri Pacific Railway Company and the Little Rock and Memphis Railroad Company, and those companies issued bills of lading for cotton, which specified the number of bales and the marks, agreeing to deliver the cotton at an address specified in the bill of lading; that the same bills of lading covered cotton which was received by the plaintiff at Argenta, and which actually was at Argenta, and cotton received at Little Rock, and which actually was at Little Rock; that one form of bill of lading was issued by the Missouri Pacific Railway Company and two forms by the Little Rock and Memphis Railroad Company; that it was claimed that each form covered a portion of the cotton burned; that each form by its terms exempted the carrier from liability for loss or damage by fire; and that, as the cotton might pass through the custody of several carriers before reaching its destination, each of them provided that the legal remedy for loss or damage occurring in transit should be only against the particular carrier in whose custody the cotton actually might be at the time of the happening thereof. The Missouri Pacific Railway Company in its bills of lading reserved to itself the privilege of compressing all cotton signed for on the bill of lading. The Memphis & Little Rock Railroad Company did not reserve that privilege, but in one of its two forms, which was a through bill of lading to England, it stipulated for the benefit of any insurance that might have been effected on the goods. There are five of such foreign bills of lading, covering one hundred and fifty-eight bales of lost cotton. Bills of lading covering one thousand four hundred and sixty bales, alleged to have been burned, were issued by the Missouri Pacific Railway Company. The loss claimed on behalf of the latter company was for one thousand four hundred and sixty-three bales. The bills of lading issued by the Memphis and Little Rock Railroad Company were for nine hundred and ninety-two bales, but the loss claimed was for one thousand two hundred and eleven bales. By the bills of lading issued by the Missouri Pacific Railway Company on the lost cotton eight hun-

dred and eighty-four bales were covered after the date of the policy, and by those issued by the Memphis and Little Rock Railroad Company two hundred and twenty-five bales were covered after that date. It also appears by the bill of exceptions that, on the issuing of the bills of lading, the respective railroad companies notified the plaintiff of their issue, and ordered the cotton designated therein to be compressed at Argenta; that all of the cotton transported from Little Rock to Argenta was carried on the track and by the cars of the Missouri Pacific Railway Company; that the Little Rock and Memphis Railroad Company had no track, and ran no cars, near the premises described in the policy; that the plaintiff paid the Missouri Pacific Railway Company an agreed price for the transportation of the cotton from Little Rock to Argenta; and that the cotton was to be compressed after it arrived at Argenta, and was there to be loaded on the cars of such of the two railroad companies as its marks and the bills of lading called for, to be transported by them to its destination. The bill of exceptions further states that the plaintiff offered evidence tending to prove that two thousand six hundred and seventy bales of cotton, covered by said bills of lading, were burned at the fire in question, while in the hands of the plaintiff for compression, after the bills of lading were issued, and at the place described in the policy. The plaintiff also proved that in October and November, 1887, there was an accumulation of cotton at the premises described in the policy, owing to the fact that the Missouri Pacific Railway Company had not sufficient cars to transport the cotton to Argenta as fast as it was received; that the cotton-sheds were open sheds, and were at the time of the fire full of cotton, which had no tarpaulin or other cover over it, and stood within three or four feet of the track of the Missouri Pacific Railway Company, over which locomotives and trains passed several times daily; that after the sheds were full the cotton was stored in the street, leaving a passage-way some four feet wide for foot passengers; that the two railroad companies had no control over the cotton while so stored, and could not obtain actual possession of it until the Missouri Pacific Railway Company transported it to Argenta for compression; but that that company could take it at any time across the river for compression.

The defendant offered in evidence the proof of loss furnished

by the plaintiff to it, made out after the bringing of the suit, alleging the total destruction by fire of two thousand six hundred and eighty-seven bales of cotton, in addition to what was known as the Hanger cotton, and that the two thousand six hundred and eighty-seven bales were held by the plaintiff in trust or on commission — that is to say, to be compressed — and were the property of various persons; the plaintiff being interested in the same to the extent of its charges, and stating the names of the consignees, and the number of bales and their value pertaining to each consignee, no allusion being made to any interest of the railroad companies.

1. The plaintiff offered evidence tending to prove that the policy in suit was taken out by it for the benefit of the railroad companies named in the complaint and in pursuance of agreements between the plaintiff and those companies, by which the plaintiff agreed to take out such insurance. The defendant objected to such evidence, on the ground that it was incompetent, and in contradiction of the terms of the policy. The objection was overruled, and the defendant excepted.

The plaintiff also offered evidence tending to prove that by agreement between it and the railroad companies it charged and collected from them thirteen cents per hundred pounds for all cotton compressed by it, which charge was by agreement intended to cover, and did cover, the compression of the cotton, the loading of it on the cars at Argenta, and the cost of insuring it for the benefit of the railroad companies. The defendant objected to the evidence, on the ground that it was immaterial, irrelevant and incompetent. The objection was overruled, and the defendant excepted.

The plaintiff also offered evidence tending to prove that the contracts and customs of business before stated were well known to shippers and the defendant when the policy sued on was issued, it having been stated to the agents of the defendant by an officer of the plaintiff, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the railroad companies. The defendant objected to this evidence, but the objection was overruled and the defendant excepted.

The plaintiff further also offered evidence tending to prove that claims had been filed against the Missouri Pacific Railway

Company by the owners of one thousand four hundred and sixty-three bales of cotton burned at the fire, of the claimed value of \$72,735.58; that since the commencement of this suit that company had paid such claims to the amount of \$65,000; and that the balance had been adjusted by that company, and would be paid. The defendant objected to the evidence on the ground that it was immaterial, irrelevant and incompetent, but the objection was overruled, and the defendant excepted.

The plaintiff further offered evidence tending to prove that claims had been filed against the Little Rock and Memphis Railroad Company by the owners of one thousand two hundred and eleven bales of cotton burned at the fire, of the claimed value of \$57,529.55, no part of which has been paid by that company, though suits had been brought on several of the claims, and were still pending. The defendant objected to the evidence, on the ground that it was incompetent, irrelevant and immaterial; but the court overruled the objection, and the defendant excepted.

After the close of the evidence, the defendant requested the court to instruct the jury as follows: "(1) The policy of insurance of the defendant on which this action is brought covered all goods in possession of the Union Compress Company at the place designated in the said policy, at the date when said policy was issued, which were held by said Union Compress Company under warehouse receipts issued to the owners of said cotton by said company, and also all cotton subsequently, and during the life of said policy, so received by the Union Compress Company. (2) The policy in question insures the goods of the Union Compress Company at the place designated. It also insures the Union Compress Company to the extent of its liens upon, or charges against, all goods held by it during the life of the policy, not its own, but held by it in trust or on commission. It also insures the interest of the owners of the legal title to such goods so held. It does not insure any one else. Any possible interest of any common carrier not an owner of the goods or any of them, in the place designated, is not insured by said policy. (3) The jury are instructed to disregard all evidence in the case tending to show that the insurance in question was issued for the benefit of any railroad company not an

owner of any of the goods destroyed by fire, for the value of which recovery is sought herein." The court refused to give any of those three instructions, and the defendant excepted to each refusal.

The foregoing exceptions, except the two which relate to the sustaining of the demurrer to paragraphs 7 and 8 of the answer, may be grouped together, because they relate to the same question. The court refused to strike out the matter in the complaint which is before recited in brackets, and also overruled the demurrer of the defendant to that portion of the complaint; and on the trial the plaintiff was permitted to introduce evidence tending to prove some of the allegations contained in that part of the complaint. The three instructions, before quoted, as asked by the defendant, and not given, relate to the same matter. The defendant contends that there was error in the action of the court covered by those exceptions, and complains that the court treated the words in the policy, "their own, or held by them in trust or on commission," as if they read, "on account of whom it may concern;" that, as the plaintiff did not own the cotton, the beneficiaries under the policy were its owners; that no interest of any common carrier was covered by the policy; that it was not ambiguous; and that no parol testimony was admissible to aid in its interpretation, or to show that the railroad companies were intended to be beneficiaries under it. The view urged is that the plaintiff did not own any of the cotton, or hold any of it on commission; that the insurance on goods held in trust was an insurance only for the benefit of the owners of the cotton; and that evidence of an intention to effect the insurance for the benefit of one who was not the owner of the goods was inadmissible, because it would contradict the policy. But we think the positions taken on behalf of the defendant are not sound. The title to cotton in the temporary custody of a bailee for compression, for which receipts or bills of lading have been given, is manifestly changing hands constantly. The language of the present policy, insuring cotton, "their own, or held by them in trust or on commission," accommodates such a state of things. In the present case the insurance was really taken out by the railroad companies, and that fact was well known to the agents of the defendant at the time the policy was issued. The railroad companies had an in-

insurable interest in the cotton, and to that extent were the owners of the cotton, which was held in trust for them by the plaintiff. Evidence of their ownership of the cotton was admissible. *Home Ins. Co. v. Warehouse Co.*, 93 U. S. 527, 542. The policy covered all the cotton which was placed in the hands of the plaintiff by those companies. It was lawful for the plaintiff to insure in its own name goods held in trust by it, and it can recover for their entire value, holding the excess over its own interest in them for the benefit of those who have intrusted the goods to it. *De Forest v. Fulton Insurance Co.*, 1 Hall, 94; *Home Ins. Co. v. Warehouse Co.*, 63 U. S. 527, 543; *Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Insurance Co.*, 45 N. Y. 606; *Waters v. Assurance Co.*, 5 El. & Bl. 870; *Siter v. Morris*, 13 Penn. St. 218; *Johnson v. Campbell*, 120 Mass. 449; *Fire Ins. Ass'n v. Merchants & Miners' Transp. Co.*, 66 Md. 339; 7 Atl. Rep'r, 905; *Railway Co. v. Glyn*, 1 El. & El. 652; *Insurance Co. v. Hamilton*, 14 Wall. 504, 508. The words "held by them in trust," in this policy, cannot properly be limited to a holding in trust merely for an absolute owner, when it clearly appears that the railroad companies had an insurable interest in the cotton, and the plaintiff held the property in trust exclusively for those companies. The reasoning of the cases where the bailor was the owner of the goods insured by the bailee applies equally to any person, who, having an insurable interest in property, intrusts it to another; and such bailor can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee. The original depositors of the cotton surrendered to the railroad companies the receipts which they had taken from the plaintiff, and those companies were thus substituted in the relation to the plaintiff which before had been held by such depositors. The railroad companies thus became the beneficiaries of the trust, so far as the plaintiff was concerned, because they thus became the persons to whom the plaintiff owed the duty of bailment, and the persons entitled to demand the possession of the property from the plaintiff. There was privity in the plaintiff with the person who held its receipt, and privity with no one else. This is a necessary and obvious result of the course of business; and the business in question could not be carried on under any other circumstances, so as to give protection by insurance to the parties really interested.

The case is not varied or affected by the clause in the receipts given by the plaintiff, "not responsible for any loss by fire," because the relation of the plaintiff to the property intrusted to it, and its duty to the bailor, determine the legal property of the insurance for the benefit of the latter. In the present case the arrangement was that the railroad companies should pay to the plaintiff, in connection with the charge for compressing, an additional sum, which would provide for the insurance of all cotton in the possession of the plaintiff, for which the railroad companies should issue bills of lading. The defendant had notice that the insurance was effected in the interest of the railroad companies, and it issued the policy in the terms it did to include the protection of the railroad companies. The fact that the same policy might protect the interest of other persons in respect to cotton held for them by the plaintiff cannot affect the question whether it protects the interest of the railroad companies in respect to cotton held by the plaintiff for them during the life of the policy. Nor is it material whether the cotton was originally deposited by the railroad companies, or whether their interest accrued through the subsequent transfer to the railroad companies of receipts given by the plaintiff on a deposit of cotton made by other parties.

2. We come now to another group of errors assigned. The defendant requested the court to instruct the jury as follows: "The policy in question provides that it shall be void if there be any change in the possession of the insured property, except under circumstances which have no bearing on this case. If the jury believe from the evidence that, after the policy in question was issued, any common carrier, with the knowledge and consent of plaintiff, and under agreement with plaintiff, issued its bills of lading for any of the cotton which at the date of the policy was or thereafter came into possession of the plaintiff, the issuance of such bills of lading, under the conditions of the policy, avoided the policy as to all cotton covered by such bills of lading." The court refused to give such instruction, and the defendant excepted to the refusal. The court instructed the jury as follows: "By an agreement made between the plaintiff and the St. Louis, Iron Mountain and Southern Railway Company and the Memphis and Little Rock Railway Company, the plaintiff engaged to insure for said railway companies, respectively, all cotton stored in the com-

press sheds and yards of the plaintiff, at the foot of Main street, Little Rock, when the railway companies, or either of them, should notify the plaintiff of the issuance by them of bills of lading therefor. This agreement was carried out, and on the day of the fire the plaintiff held insurance in various companies, aggregating the sum of \$142,500 in trust, and to indemnify the railway companies against loss or damage by fire of the cotton for which they had issued their bills of lading and which was stored in the plaintiff's sheds and yards described in the policy, at the foot of Main street." The defendant excepted to this instruction. The court also charged the jury as follows: "As the plaintiff is a trustee, and insured the cotton for the benefit of the railway companies, and has no separate claim of its own on the property, it is only entitled to recover an amount equal to its liability to the railroad companies; or, in other words, a sum that will make the railway companies whole for the cotton on which they had issued bills of lading; so that, if the market price of cotton produces a larger sum than the aggregate loss of the railway companies — and two thousand six hundred and seventy bales, at \$50 per bale, if you should find that was the number of bales and their value, produces an amount slightly in excess of the claims of the railroad companies — then the plaintiff's recovery must be on the basis of the latter sum; that is, one that makes the railroad companies whole. In no event is the market value of the cotton to be increased, but it may be reduced by the difference between the value and the amount that will satisfy the just claims of the railway companies. What amount of cotton was burned for which the railway companies had issued bills of lading, and which was covered by policies taken out by the plaintiff, the value of the same, and the amount of the just demands of the railway companies against the plaintiff for the cotton so burned, are questions of fact to be determined by you." The defendant excepted to this charge. The court also charged the jury as follows: "This suit is brought on a policy of insurance issued by the defendant's company to the Union Compress Company to indemnify the railroad company for the loss of cotton, or for cotton that might be burned after the railroad company issued its bills of lading for it, and while it yet remained in the custody of the Compress Company. Now, the Com-

press Company, under its contract with the railroad company, is bound to make good, by insurance, to the railroad company any damages resulting to it from the loss of cotton which the Compress Company held for the railroad company after the railroad company had issued its bills of lading therefor and notified it thereof." The defendant excepted to this charge. The defendant contends that, although, under a proper construction of the policy, the railroad companies may be regarded as properly beneficiaries under it, the matters involved in the instructions so given by the court were questions of mingled fact and law, and were erroneous, in the light of the facts proved by the plaintiff. The ground urged is that the policy cannot be reconciled with any intent to insure a railroad company against a loss caused by its own negligence, because the policy insures against "all direct loss or damage by fire;" that, therefore, the only interest which the railroad companies had in the cotton was a contingent interest, arising from their liability for damages for loss by a fire occurring through their own negligence that the interest alleged to have been insured as that of the railroad companies was not such as could have sustained a claim on a direct loss by fire, because it was a contingent or doubtful interest, and not a certain or direct interest; that the fire alone could not inflict any loss; and that whether the railroad companies would suffer loss would depend on the contingencies, (1) whether or not their negligence caused the loss; (2) whether the owner would be able to prove negligence in the railroad companies; (3) whether the owner was innocent of contributory negligence; and (4) whether the owner should make a claim for loss against the railroad companies, within the statute of limitations. Under this head it is also urged that on the face of the policy the insurance was on cotton held in trust by the plaintiff, in a designated place, for thirty days after November 2; that it was claimed by the plaintiff, in the face of the policy, and contradictory of its terms, that cotton covered by a bill of lading issued November 8, by the Missouri Pacific Railway Company, which was held in trust by the plaintiff, and was in the place described, was not covered by the policy until the bill of lading was issued; that if, as the defendant alleges the fact to be, that cotton was covered by the policy from the 3d to the 8th of November, for the benefit of its owners, there was no process known to the law by which the

benefit of such insurance could be transferred to the railroad companies, without action by either the owner or the insurer; that the fact that the plaintiff understood that the insurance was for the benefit of the owners of the cotton was shown by the practical construction put upon the insurance by the plaintiff after the fire, in putting in a claim on behalf of Hanger for one hundred and twelve bales of cotton burned, not covered by the bills of lading; and being paid for it, on behalf of Hanger, as owner of the cotton; and that thus the plaintiff claims that the insurance was for the owners of the cotton, or for the railroad companies, according to circumstances. It is further urged that if the bills of lading changed the possession of the cotton, it was at the time of the fire in the possession of the railroad companies, and not in that of the plaintiff, and the plaintiff had ceased to hold it in trust; that in such case it was not insured, because of the provision in the policy that any change in the possession should avoid the policy; that if the bills of lading did not change the possession, there could have been no insurance on behalf of the railroad companies, because, in the absence of possession by them, they had no right to insure and no contingent liability to loss; and that it was error in the court to charge that at the time of the fire the plaintiff held insurance on cotton covered by bills of lading. This court is also asked to review its announcement of the principle of law laid down in *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312, 324; 6 Sup. Ct. Rep. 750, 1176, that "no rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants." It is also contended that the jury had a right to decide whether or not the policy was issued on goods held in trust for the railroad companies by the plaintiff, and whether or not the plaintiff or the railroad companies held the cotton at the time of the fire; and that these were not questions for the court to decide.

In reply to the suggestions, it is to be said that the exception of loss by fire contained in the receipts given by the plaintiff, and in the bills of lading given by the railroad companies, did not free them from responsibility for damages occasioned by their

own negligence or that of their employees. Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine announced in the case cited has been referred to with approval in the subsequent cases of *Insurance Co. v. Adams*, 123 U. S. 67, 72; 8 Sup. Ct. Rep. 68, and *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 438; 9 Sup. Ct. Rep. 469.

As to the suggestion that by the bills of lading the possession of the cotton was transferred to the railroad companies, and that the policy was avoided thereby, the answer is that the cotton was still in the hands of the plaintiff, in its actual possession, and upon its premises. At most, the railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took only constructive possession of it; and the plaintiff, retaining actual and physical possession of it, did not lose any element of possession necessary to give it the right to effect insurance for its own benefit, and as bailee or agent, for the protection of the railroad companies. All that the railroad companies acquired was the right to ultimate possession, which passed to them by the transfer to them by the original depositors of the cotton receipts given by the plaintiff.

As to the argument that no recovery can be had in the interest of the railroad companies, because the injury to them depended upon their liability for the negligence of their employees in causing the fire, and the point taken in regard to the words of the policy, "direct loss or damage by fire," the reply is that those words mean loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. The books are full of cases on that subject, and the meaning of the policy is not doubtful. Remoteness of agency is the explosion of gunpowder, gases or chemicals, caused by fire; the explosion of steam-boilers; the destruction of buildings to prevent the spread of fire, or their destruction through the falling of burning walls, and so forth. In the present case, the bales of cotton were physically burned by the direct action of fire.

3. The court also charged the jury as follows: "Now, you have heard the testimony, gentlemen, with reference to the situation under which this cotton was placed, and the length of time

it remained there. If you think there is no negligence on the part of the railroad company, then you will find that the railroad company is not liable for this cotton. If you can say that that was a proper place to store cotton, and that leaving a passage-way there of not exceeding four feet up and down, through which persons passed at all hours of the day and night to the boat-house and skiff ferry, and it being a dry season, with three or four thousand bales of cotton stored there — *then, if you say this is not negligence, you excuse this railroad company, and to that extent will disallow the claim of the plaintiff; but if you should so find I would be very much surprised at your verdict and would not be surprised if I should set it aside; but I will leave it for you to say.*" The defendant excepted to this instruction, and especially to the italicized portion thereof.

It is urged that in this part of the charge the court did not allude to facts proved which the defendant claimed disproved negligence, and that thus the instruction was not a fair one as to the facts; that the place of storage was selected and the cotton was stored there by the owners of it, and not by the Memphis and Little Rock Railroad Company; that no negligence can be imputed to the latter on account of the unfitness of the place; that it had no control over the cotton stored in that place, and had no track at that place, the Missouri Pacific Railway Company having the track there; that the Memphis and Little Rock Railroad Company had no opportunity to obtain possession of the cotton until after it had been compressed at Argenta; that the bills of lading of the latter company exempted it from liability for loss occurring on the lines of other carriers, and the cotton was burned, not on its line, but on the line of the Missouri Pacific Railway Company; that the court made no allusion to any of these matters as going to establish the absence of negligence and liability on the part of the Memphis and Little Rock Railroad Company; that the court threatened the jury with its displeasure and the setting aside of the verdict if the jury should bring in a verdict for the defendant on that issue; and that this action of the court was erroneous. But the mere fact of the dwelling by the court with emphasis upon facts which seemed to it of controlling importance, and expressing its opinion as to the bearing of those facts on the question of negligence, is immaterial,

if the court left the issue to the jury. In the charge, just before the passage complained of, the court, in referring to the question of the liability of the Memphis and Little Rock Railroad Company for the destruction of the cotton, had said to the jury: "It is for you to determine whether this railroad company was not guilty of negligence, and was not at fault in leaving this cotton in an exposed condition after it issued bills of lading therefor;" and in the clause of the charge objected to the court expressly states that it leaves the question of negligence to the jury. On this subject, this court said, in *Railroad Co. v. Putnam*, 118 U. S. 545, 553; 7 Sup. Ct. Rep. 1: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to a jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error." See, also, *Nudd v. Burrows*, 91 U. S. 426; *Railroad Co. v. Horst*, 93 U. S. 291; *Railway v. Vickers*, 122 U. S. 360; 7 Sup. Ct. Rep. 1216.

4. In the course of the trial the plaintiff offered evidence tending to prove that the contracts and custom of business stated in the bill of exceptions were well known to shippers and to the defendant when the policy sued on was issued, it having been stated to the agents of the defendant by an officer of the plaintiff, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the railroad companies. The defendant objected to the admission of the evidence, but the objection was overruled, and the defendant excepted, and this is alleged as error. In this connection it is urged that the complaint does not allege any such knowledge on the part of the defendant, or any intention on its part to issue its policy for the benefit of the railroad companies. The case of *Hough v. Insurance Co.*, 36 Md. 398, is cited in support of this assignment of error. But we think the evidence was admissible. In the *Hough Case* the policy covered the merchandise insured, "their own, or held by them in trust, or in which they have an interest or liability."

Parol evidence was held to be incompetent which was offered to show that the policy did not cover merchandise which was their own. The evidence would have contradicted the plain terms of the policy. In the present case, the evidence offered was admissible under the ruling in *Home Ins. Co. v. Warehouse Co.*, 93 U. S. 527, 542. In that case the court says: "It is no exception to the rule (governing the admission of parol evidence) that, when a policy is taken out expressly 'for or on account of the owner' of the subject insured, or 'on account of whosoever it may concern,' evidence beyond the policy is received to show who are the owners, or who were intended to be insured thereby. In such cases, the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there is no contract at all." See, also, *Finney v. Insurance Co.*, 8 Metc. 348; *Fire Ins. Ass'n v. Merchants & Miners' Transp. Co.*, 66 Md. 339; 7 Atl. Rep'r, 905; *Snow v. Carr*, 61 Ala. 363. Having issued the policy with notice that it was intended to cover the interest of the railroad companies, the defendant is estopped from asserting that the policy was intended to protect only the legal owners of the cotton.

5. It is alleged, also, that the court erred in sustaining the demurrer of the plaintiff to paragraph 7 of the defendant's answer, which alleged that at the time of the loss two thousand one hundred and seventy-two bales of the cotton alleged to have been burned were covered by marine policies theretofore issued to the respective owners of the cotton, and, therefore, under the terms of the policy in this suit, such cotton was not covered by it. It is alleged, also, as error, that the court at the trial rejected, on the objection of the plaintiff, and under the exception of the defendant, evidence offered by the latter tending to prove that that number of bales of the cotton covered by the bills of lading, and alleged to have been burned, were at the time of the fire covered by marine policies of insurance theretofore issued to the respective owners of such cotton residing in various portions of the United States and in England. It is to be said in reply that paragraph 7 of the answer does not show that the marine policies were on the same interest as that covered by the fire policy. This element is necessary, because otherwise the policy sued on would be of no practical force. As soon as the consignees

of the cotton were advised by telegraph of its shipment, they would take out marine policies to cover their own risk ; and thus the fire insurance companies would obtain the premiums of insurance from the railroad companies, and immediately avoid all risk because of the taking out of the marine policies. *North British Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. Div. 569. The question of the legal effect of the contribution clause of the policy, before recited, is not presented by the record.

The objection alleged at the trial to the introduction of evidence as to the marine policies was made on the ground that it was immaterial and irrelevant, and that the insured knew nothing of those policies, and had no interest in them. This was the objection which was sustained ; and the allegation of paragraph 7 of the answer was that the marine policies had been issued to the respective owners of the cotton. It did not appear that either the insurer or the insured had any previous knowledge of the existence of the marine policies, nor did it appear whether they were issued before or after the date of the fire policy. The issuing of the marine policies, in order to have any effect in this case, must amount to double insurance. In no other view can the defendant have any interest in the question of marine insurance. Double insurance exists only in the case of risks upon the same interest in property, and in favor of the same person. *North British Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. Div. 569 ; *Lowell Manufg Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591 ; *Phil. Ins.*, § 359 ; *Wood Ins.* (1st ed.), § 352. No reason can exist for a distinction between the construction of a provision avoiding a policy in case of marine insurance and in case of further or additional fire insurance. In the latter case the provision is always construed as relating only to additional insurance upon the same interest, and effected by the same person, or in his interest.

The contention of the defendant is that its policy is avoided by the taking out of a marine policy by the owner of the cotton, without the knowledge or participation of the plaintiff or of the railroad companies, whether the marine insurance was effected before or after the fire insurance in favor of the railway companies, and although the fire insurance policy was taken to protect the independent interests of the railroad companies. We

cannot admit the soundness of this view. The cases cited where a policy is avoided by the carrying on of a prohibited business, or the storing of a prohibited article, without the knowledge or consent of the insured owner of a building, are placed upon the ground that the possession of the tenant or occupant of a building is the possession of its owner, and that the contracts which he makes as to the use of the insured premises are in the nature of warranties, and relate to matters over which he has legitimate control. It cannot be contended successfully that the condition in question here was intended by the plaintiff to subject the policy to forfeiture if any person who had a remote and independent insurable interest should take out a policy of marine insurance to protect that interest, the plaintiff having no privity with such person. As was said in *Grandin v. Insurance Co.*, 107 Penn. St. 26, 37: "We are not to suppose that conditions involving forfeitures are introduced into policies by insurance companies, which are purely arbitrary and without reason, merely as a trap to the assured, or as a means of escape for the company in case of loss. When, therefore, a general condition has no application to a particular policy, where the reason which alone gives it force is out of the case, the condition itself drops out with it. See, also, *Hoffman v. Insurance Co.*, 32 N. Y. 405.

The offer of evidence by the defendant at the trial, in regard to the marine insurance, was by its terms an offer to prove the mere fact of marine insurance, in support of the defense set up in paragraph 7 of the answer; and the claim on the part of the defendant that the evidence was proper to support the further defense set up in the answer, as to the amount of the proportionate liability of the defendant, is not tenable. The offer was to prove merely the fact of marine insurance, and not to prove its amount. It was an offer in bar of liability, and not an offer applicable to a reduction of the verdict. No suggestion of the latter object was made in the offer, and the evidence, if admitted as offered, could have no bearing upon the question as to how much the proportionate liability of the defendant would be reduced by virtue of the marine policies. The only specific offer to prove the terms of any marine policy, and the extent of the insurance under it, was made in the form of an offer of the deposition of one Phillips and the testimony of one Bowen, both of

which were excluded on proper grounds, and complaint is made only of the exclusion of the deposition of Phillips.

6. It is assigned for error that the court erred in striking out the testimony in the deposition of Phillips, the clerk of Ralli Bros., who were claiming pay from the Memphis and Little Rock Railroad Company for one hundred and fifty-eight bales of cotton, to the effect that that cotton was covered by marine policies taken out by Ralli Bros. The policies of insurance mentioned in the testimony in the deposition were not attached to it. The testimony was objected to by the plaintiff as incompetent, because it was an attempt to prove by parol the contents of written instruments. It was stricken out by the court, and the defendant excepted.

The ruling of the court was manifestly correct. There was no proof that the policies referred to were in Liverpool, for all that the witness Bowen said was that he was informed they were there; and, as to the copy which Phillips refused to attach to his deposition, all the evidence in regard to its identity is that Phillips said to the witness Bowen that such copy was a copy of the marine policy which had been issued on the cotton. This was all of it, only hearsay evidence.

7. The court was requested by the defendant to instruct the jury as follows: "As this action is brought solely on behalf of the railroad companies on account of liability incurred through carelessness of the agents and servants of the companies, no cause of action accrued against the defendant until the actual payment by said companies of damages on account of the alleged fire, and the recovery cannot be greater than the value, on November 14, 1887, at Little Rock, of the cotton so burned and paid for, nor greater than the sum paid by the railroad companies; that is, if they have paid more than the value of the cotton, they cannot recover the excess from the defendant; if they have paid less than the value, they can recover only to the extent of the payment." The court refused to give that instruction, and defendant excepted. This is alleged as error. It is urged that the Memphis and Little Rock Railroad Company has never paid any damages, and that the Missouri Pacific Railway Company had not paid any when this suit was commenced; and it is contended that no cause of action accrues, in a case of that kind, until pay-

ment of the damages by the railroad companies is made. But, as a bailee, under a policy taken out to cover property, his own, or held by him in trust or on commission, may enforce the contract of insurance to the full value of the property destroyed, holding the proceeds primarily for his own benefit and the balance for that of his bailor, the right of action of the plaintiff accrued on the occurring of the loss. The case cited by the defendant (*Railroad Co. v. Spratt*, 2 Duv. 4), does not apply to the present case. That was a suit brought by a consignee of goods against a carrier, where the carrier was entitled, under a bill of lading given by it to the consignee, to insurance obtained by the consignee; and it was held that the consignee could not be compelled to proceed upon the policy of insurance before enforcing his claim against the carrier, even where it appeared that the insurer had agreed to pay its loss under the policy, and although it was alleged that the suit was prosecuted for the benefit of the insurer. But here the plaintiff is the assured. The insurance included the protection of the railroad companies. The premium was paid. The insured property was destroyed by fire. The condition of the liability of the insurer was complete, and its liability had fully accrued. The only question for litigation was whether the railroad companies were protected by the insurance. The defendant is called upon to perform only its agreement to pay the insurance money in case of the destruction of the cotton by fire. Its liability is not dependent upon the question whether the liability of the railroad companies has been discharged; nor is the plaintiff's right of action contingent upon the payment by the railroad companies of the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under circumstances which impose a liability upon the railroad companies. We see no error in the record, and the judgment is affirmed.

1. Insurance law—property "held in trust."—The following authorities bear upon the construction of these words as used in insurance policies: *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504; *Home Ins. Co. v. Baltimore Warehouse Co.*, 98 U. S. 527; *Robbins v. Fireman's Fund Ins. Co.*, 16 Blatchf. 122; *Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 94; *Hugh v. Ins. Co.*, 36 Md. 399; *Fire Ins. Ass. v. Merchants & Miners' Transportation Co.*, 66 Md. 339; *Lee v. Howard Fire Ins. Co.*, 11 Cush. 324; *Johnson v. Campbell*, 120 Mass. 449;

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Home Ins. Co., v. Favorite, 46 Ill. 263; Bridelman v. Powell, 10 Mo. App. 280; Siter v. Morris, 13 Penn. St. 218; Thomas v. Commisky, 108 Penn. St. 354; London, etc., Ry. Co. v. Glyn, 1 El. & El. 652; 102 E. C. L. R. 651; Waters v. Monarch Fire Ass. Co., 5 E. & B. 870; 85 E. C. L. R. 868.

2. Insurable interest.—See *Murdock v. Franklin Ins. Co.*, 1 Lewis R. & Corp. Rep. 24, and note.

COMMONWEALTH, EX. REL. ATTORNEY-GENERAL, v. NEW YORK,
LAKE ERIE & WESTERN RAILROAD COMPANY.

(19 Atl. R. 291; 122 Penn. St. 591.)

1. CORPORATIONS. POWER TO HOLD REAL ESTATE. ESCHEAT. The act of April 26, 1855, provides that "no corporation * * * shall * * * hereafter acquire and hold any real estate within this commonwealth, directly in the corporate name, or by or through any trustee, or other device whatever, unless specially authorized to hold such property by the law of this commonwealth." The act also provided that all lands held in violation of the act should escheat to the state. The act of April 15, 1869, provides "that it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber or other material interests of this commonwealth by the purchase of their capital stock or bonds, or either of them, or by the guaranty of or agreement to purchase the principal or interest, or either, of such bonds." Held, that real estate belonging to a mining corporation authorized by law to hold it could not be forfeited to the state under the act of 1855, for the reason that all the stock of the mining company was held by a railroad company, and that such facts did not constitute a device on the part of the railroad company to evade the act of 1855.

Silas W. Pettit, *Wm. S. Kirkpatrick*, Attorney-General, *John F. Sanderson*, *John R. Read*, *George S. Jenks* and *P. Jenks* for appellant. *John G. Hall* and *George W. Biddle* for appellees.

PAXSON, C. J. This was an information in the nature of a quo warranto, filed by the attorney-general, the object of which was to escheat to the commonwealth certain lands in Elk county alleged to be held by or for the defendant railroad company. The facts as disclosed by the evidence and admitted by the parties, do not differ essentially from those in *Com. v. Railroad Co.*, reported in 114 Penn. St. 340; 7 Atl. Rep'r, 756. This is really a branch of the same proceeding, but for lands lying in a different county. The present case has been ordered of our own motion,

and has received careful consideration. This was due to the gravity of the questions involved and the amount in controversy.

It was alleged, in the first place, by the commonwealth that the railroad company had violated section 5 article 17, of the constitution of this state. The said section is as follows: "No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works, nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as may be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal, not exceeding fifty miles in length." It will be noticed that this clause in the constitution affixes no penalty for its violation. It is conceded that, for a violation of the organic law, a Pennsylvania corporation, or a foreign corporation having or exercising corporate franchises within this commonwealth, would forfeit such franchises. This, however, would not involve an escheat or confiscation of its property. For present purposes, we must regard this constitutional provision as out of the case. The question here is whether the real estate in controversy is liable to escheat.

This is not a proceeding to forfeit the company's franchises, but to escheat its lands. It must rest, if it can be sustained at all, upon the act of April 26, 1855 (P. L. 329), the fifth section of which provides that "no corporation * * * shall * * * hereafter acquire and hold any real estate within this commonwealth, directly in the corporate name, or by or through any trustee or other device whatsoever, unless specially authorized to hold such property by the laws of this commonwealth."

This is the prohibition of the act. The penalty for its violation is contained in section 9. It is as follows: "That all property hereafter acquired and held by persons, corporations or associations forbidden by this act, and all such hereafter acquired, and held beyond the limit prescribed as aforesaid by this act shall escheat to this commonwealth; and, upon the same being adjudged to have escheated under proceedings in court by quo warranto in all respects as is provided by law in the case of the

usurpation of any corporate franchises, the same shall be taken in possession and disposed of," etc. It was not alleged that the defendant railroad company held the title to any of the lands in controversy either in its corporate name, or by or through a trustee. The contention of the commonwealth was that the title thereto was held by the Northwestern Mining and Exchange Company, defendant; that all of the stock of said last-named company was held by the said railroad company; and that the placing of the title in the former company was a mere "device" to enable the railroad company to hold lands indirectly, which it was forbidden by the act of 1855 to hold directly, or by or through a trustee. Whether it was such "device" was the question we directed to be submitted to the jury when the other branch of the case was here, reported in 114 Penn. St. 340; 7 Atl. Rep. 756.

It is not denied that the Northwestern Mining and Exchange Company is a Pennsylvania corporation, and authorized by its charter to hold these or similar lands, and to carry on the business of mining, milling, smelting and refining gold, silver, copper, iron, lead and other ores, coal and other minerals. Nor was it denied that under the act of 15th April, 1869 (P. L. 32), the New York, Lake Erie and Western Railroad Company had the right to purchase and hold all or any portion of the stock of the Northwestern Mining and Exchange Company. The said act expressly declares "that it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber or other material interests of this commonwealth by the purchase of their capital stock or bonds, or either of them, or by the guaranty of or agreement to purchase the principal or interest, or either, of such bonds." The object of this legislation is obvious. It was to authorize railroad and canal companies to employ their capital and credit to aid in the development of the mineral resources of the commonwealth. Such development, as every one knows, is in many instances beyond the reach of individual enterprise. It was easy enough to form corporations with all the requisite powers for this purpose. It is a very different thing to find capitalists to take their stocks or bonds. Hence it was that the legislature gave to railroad and canal companies the power to purchase both stocks and bonds of subcompanies. Nor was any limitation placed upon this power. They might buy a portion or

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all of the stock. It probably never occurred to the legislative mind that, while the purchase of a portion of the stock of a mining company would be aiding such corporation to develop the mineral resources of the state, the purchase of a majority of the whole of the stock of such company might be held to be a "device" to evade the act of 1855. However that may be, the act of 1869 was evidently intended to legalize, and perhaps encourage, railroad and canal companies to invest in this species of mining companies. It involved, necessarily, the control of such companies by the corporations making such investments, to the extent of the stock held by them. A majority of the stock controls the corporation; the corporation controls the land held by it. In this sense, and to this extent, the act of 1869 enabled railroad companies to control real estate, the title to which they were forbidden to hold directly or indirectly by the act of 1855. It must not be forgotten, however, that controlling real estate, by means of the ownership of a majority of the stock of such corporation, is a very different matter from holding the title to such real estate. The one is legalized by the act of 1869; the other is forbidden by the act of 1855.

It appears by the evidence that the railroad company purchased the charter of the mining company, and retained all of the stock thereof, except the number of shares requisite to qualify the directors. It is admitted that the whole interest in the stock of the mining company was owned and controlled by the railroad company. It was contended that this was not aiding the mining company, but was a mere scheme or "device" to hold lands in violation of law. This was the view taken of it by our Brother Sterrett, in the former opinion of this court, and in that case it was directed that the question whether it was a "device" to evade the act of 1855 should be submitted to a jury. That case was not heard before a full bench. Those who heard it were not unanimous. It involved a question of grave importance, and a majority of those who heard the argument were in favor of taking the verdict of a jury upon the facts. As the question is now presented here, and as it was presented below, there are no disputed facts. It is conceded that at the time these proceedings were commenced the title to the lands was in the Northwestern Mining and Exchange Company; that the said company was expressly authorized by law to hold them; that the stock of said last-named corpora-

tion is held or controlled by the railroad company, which company is in terms authorized by the act of 1869 to hold it; that the stock so held is personal property; and that the railroad company does not hold the title to said real estate, or to any portion of it, either in its own name, or by or through a trustee. With the facts upon the record undisputed, we cannot evade the responsibility of this case by throwing it upon a jury. With the facts admitted, it is the duty of this court to pass upon their legal effect, and the verdict of a jury could not aid us. Moreover, if we submit this question to a jury, we would have no rule whatever. Different juries, in different counties, might find conflicting verdicts; in which case we would have the strange result that in one county the transaction would be held to be legal, while in an adjoining county it would be held to be illegal. We were informed upon the argument, and have no doubt of its truth, that a vast amount of real estate in this commonwealth is held by corporations similar to the Northwestern Mining and Exchange Company, and chartered by the state for the purpose, *inter alia*, of holding the title to such property; that the stock of said companies is largely held by railroad corporations, in pursuance of the act of 1869; and that the said real estate is in whole or in part controlled by the latter class of corporations, by means of their stock. If in all such cases the question whether the holding of such stock is a "device" on the part of the railroad companies to evade the act of 1855 must be submitted to a jury, the consequences might be very serious and destructive of vested rights. To say the least, it would introduce an element of uncertainty into the titles to a large amount of property which it would be difficult for a purchaser to protect himself against. The possibility of such results admonishes us to move with caution, and to hesitate ere we finally adopt a principle which may lead to such confusion. If there is any thing that is clear in this case, it is that the defendant railroad company has no title, legal or equitable, to this land. Its whole title thereto, in fee-simple, passed by the conveyance to the Northwestern Mining and Exchange Company. Attention is again called to the act of 1855, and at the risk of being prolix, I repeat it: "No corporation shall hereafter acquire and hold real estate within this commonwealth, directly in the corporate name, or by or through any trustee, or other device

whatsoever, unless specially authorized to hold such property by the laws of this commonwealth." It will be observed that the prohibition of the act is of a threefold character, viz.: (a) Holding real estate in its corporate name; (b) by means of a trustee; and (c) by any device whatever. It must be conceded, indeed it is not denied, that there is no violation of the first two prohibitions. It is equally clear to my mind there is no violation of the third, for the reason that the railroad company has, as before stated, no title to the real estate of any kind. If it has no title, how can it hold title by a "device?" The only answer that has or can be made to this is that the company controls said real estate. If we concede this proposition, where, in the act of 1855, is there to be found a prohibition of a railroad company controlling the use of real estate? The act strikes only at the holding of the title, and, as it is a highly penal statute — penal to the extent of practically confiscating all real estate held in violation thereof — we are not at liberty to extend it beyond its terms. The legislature may have had good reasons to prohibit railroad companies from holding the title to large bodies of mining lands. They may not have had the same reasons to move them to prohibit all control over them. At any rate, they have not done so, which is sufficient for our purpose. As before observed, this is a question of escheat. It must be manifest that, before there can be an escheat of these lands under the act of 1855, it must appear that the defendant railroad company holds the title thereto in its corporate name, or by or through a trustee, or by some device by means of which said company not only controls the lands, but enjoys the beneficial ownership thereof. In other words, it must have either the legal or the equitable title or it has no title whatever. If it has no title, there can be no escheat of the lands as real estate. The third section of the act of 1855, which does not appear to have been heretofore called to our attention, provides "that the shares held by shareholders in all incorporated land and building associations, and mining and manufacturing companies, shall be taken to be personal property, conferring a right to receive dividends of the profits and proceeds of the real estate held by such companies, but not to create any title in the shareholders in or to such real estate, which shall be subject only to the liens of and be fully conveyed by the corporation holding the title and owning the same." This section of the

act of 1855 is a distinct declaration by the law-making power that shares of stock held in a mining company are personal property, and create or give no title to the holder of such shares in or to any of the real estate held by such company. How, then, is it possible to escheat it as real estate, belonging to or held for the company owing the shares? The law having fixed its character, I do not see how the parties can change it, even by a "device."

The act of 8th April, 1881 (P. L. 9), enacts "that where any conveyances of real estate in this commonwealth have been made by any alien, or any foreign corporation or corporations of another or of this state, to any citizen of the United States, or to any corporation chartered under the laws of this commonwealth, and authorized to hold real estate, before any inquisition shall have been taken against the real estate so held to escheat the same, such citizen or corporation grantee as aforesaid shall hold and may convey such title and estate indefeasibly, as to any right of escheat in this commonwealth, by reason of such real estate having been held by an alien, or a corporation not authorized to hold the same by the laws of this commonwealth." While I do not consider this act important in the determination of this case, as the contention of the commonwealth cannot be sustained, for the reasons already given, it is proper to say that it appears to condone the alleged offense, so far as the legislature may lawfully do so. It removes the penalty of escheat imposed by the act of 1855. It may be said, however, that it is controlled by section 10; article 17, of the constitution, which declares: "No railroad, canal or other transportation company, in existence at the time of the adoption of this article, shall have the benefit of any future legislation, by general or special laws, except on condition of complete acceptance of all the provisions of this article." In the absence of any evidence that the defendant company had accepted the provisions of the above article, it is urged that it cannot claim the benefit of the act referred to. It is doubtless true that, before a railroad company can enjoy the benefit of new legislation enlarging its powers or increasing its facilities, it must formally accept all of the provisions of the seventeenth article of the constitution relating to railroads and canals. This question, however, is not raised. The act of 1881 is in the way of the commonwealth. No one doubts that the act of 1855, imposing the

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penalty of escheat, could at any time have been repealed by the legislature. The repeal of the act would have been an answer to this proceeding. The commonwealth would have nothing to rest it upon. The act of 1881 does not in terms repeal the act of 1855, but it removes the penalty. This information was not filed until several years after the passage of the act of 1881; nor had any inquisition been taken against the real estate in controversy until after it had been conveyed to the Northwestern Mining and Exchange Company. The case comes, therefore, precisely within the terms of the act of 1881, and, were we in doubt as to our former position, we might well affirm the judgment upon this ground alone. We have considered this case solely upon the power of the commonwealth to escheat the lands. No question is raised under the constitutional provision referred to, and none is decided.

Judgment affirmed.

STERRETT and CLARK, JJ., dissent.

1. Power of corporations to hold real property.—Corporations have power at common law to acquire and hold real estate for the purposes for which they are organized. *Page v. Heineberg*, 40 Vt. 81; *Blanchard's Gun-stock Turning Factory v. Warner*, 1 Blatchf. 258; *Old Colony R. Co. v. Evans*, 6 Gray, 38; *Overseers of Poor v. Sears*, 22 Pick. 122; *McCarter v. Orphan Asylum Society*, 9 Cow. 437; *Spear v. Crawford*, 14 Wend. 23; *Moss v. Averill*, 10 N. Y. 449; *Reynolds v. Stark County*, 5 Ohio, 205; *Overmyer v. Williams*, 15 Ohio, 26; *The Banks v. Poitiaux*, 3 Rand. 141; *Thompson v. Waters*, 25 Mich. 222; *Callaway, etc., Co. v. Clark*, 32 Mo. 305; *Lathrop v. Bank*, 8 Dana, 119; *Binney's Case*, 2 Bland. Ch. 142; 1 Bl. Com. 475, 478; 2 Kent Com. 227.

It follows from the statement of the power that they are not authorized to take and hold property for any purpose outside of that for which they were created. *Rensselaer, etc., R. Co. v. Davis*, 43 N. Y. 137; *Pacific, etc., R. Co. v. Seely*, 45 Mo. 212; *Occum Co. v. Sprague Manf. Co.*, 34 Conn. 529; *Bank of Michigan v. Niles, Walker (Mich.)*, 99; *State v. Commissioners of Mansfield*, 3 Zab. 510; *First Parish v. Cole*, 3 Pick. 232.

2. Effect of restrictions upon the power to hold real estate.—If the right of a corporation to acquire and hold real property is limited to certain purposes, a conveyance to it will be presumed to be within the powers of the corporation. *Farmers & Millers' Bank v. Detroit, etc., R. Co.*, 17 Wis. 372; *Farmers' Loan & Trust Co. v. Curtis*, 7 N. Y. 466; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Ex parte Peru Iron Co.*, 7 Cow. 540. If a corporation has capacity to acquire and hold real estate for certain purposes or within a specified limit, the question whether it has exceeded its powers is one between the corporation and the state, *Hayward v. Davidson*, 41 Ind. 214; *Baker v.*

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Neff, 73 Ind. 68; Hough v. Cook County Land Co., 73 Ill. 28; Alexander v. Tolleston Club, 110 Ill. 65; Barnes v. Suddard, 117 Ill. 237; De Camp v. Dobbins, 29 N. J. Eq. 36; National Bank v. Matthews, 98 U. S. 621; Natoma, etc., Co. v. Clarkin, 14 Cal. 544; Leazure v. Hillegas, 7 S. & R. 319; Baird v. Bank of Washington, 11 S. & R. 418; Goundie v. Northampton W. Co., 7 Penn. St. 238; People v. Munroe, 5 Denio, 401; Runyon v. Coster, 14 Pet. 122; The Banks v. Poitiaux, 3 Rand. 136; McIndoe v. St. Louis, 10 Mo. 577; Barrow v. N. & C. T. Co., 9 Humph. 304; Chambers v. St. Louis, 29 Mo. 576; Attorney-General v. Tudor Ice Co., 104 Mass. 239; Whitman Mining Co. v. Baker, 8 Nev. 391; Bogardus v. Trinity Church, 4 Sandf. Ch. 638; Wade v. Am. Col. Soc., 7 S. & M. 663.

3. When a conveyance of land to a corporation is void.—If a corporation is forbidden by its charter to purchase or take lands, a deed to it is void. Leazure v. Hillegas, 7 S. & R. 319; Carroll v. East St. Louis, 67 Ill. 568; Starkweather v. American Bible Society, 72 Ill. 50; United States Trust Co. v. Lee, 73 Ill. 142. A corporation was authorized to hold not exceeding ten acres of land. After it already had this amount a conveyance was made to it of a tract of eighty acres. It was held that the conveyance was null and void. St. Peter's Roman Catholic Cong. v. Germain, 104 Ill. 440.

INHABITANTS OF THE TOWNSHIP OF BERNARDS V. MORRISON ET AL.

(10 Sup. Ct. R. 333; 133 U. S. 523)

1. MUNICIPAL BONDS. BONA FIDE HOLDERS. Where there is statutory authority to issue municipal bonds and the bonds have been executed and issued by the duly constituted authorities and recite that they have been issued in pursuance of and in compliance with the statute, they are good in the hands of *bona fide* holders though the statute has not in fact been complied with.

2. A MUNICIPALITY MAY BE BOUND THROUGH THE AGENCY OF COMMISSIONERS APPOINTED BY A COURT. The fact that the bonds are issued through the agency of commissioners appointed by the court in pursuance of the statute for the special purposes of the act, would make no difference. It is wholly for the legislature to determine by what officers and agencies a municipality shall be bound.

3. Nor would it matter that the statute did not in terms authorize the commissioners to determine whether the conditions preliminary to the issue of the bonds had been complied with. It was enough that full control in the matter was given to them.

A. H. Clark and *James R. English* for plaintiff in error.
Cortlandt Parker for defendant in error.

BREWER, J. This is an action on township bonds. Judgment was rendered against the township, and it alleges error. The

bonds were issued under an act approved April 9, 1868, and found in the session laws of New Jersey for that year (page 915 et seq.). Outside of the obligatory words, this was the form of the bond:

"This bond is one of a series of like tenor, amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said township in pursuance of an act entitled 'An act to authorize certain towns in the counties of Somerset, Morris, Essex and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company,' approved April 9, 1868. In testimony whereof the undersigned, commissioners of the said township of Bernards, in the county of Somerset, to carry into effect the purposes and provisions of the said act, duly appointed, commissioned and sworn, have hereunto set our hands and seals the first day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

"JOHN H. ANDERSON, [L. s.]

"JOHN GUERIN, [L. s.]

"OLIVER R. STEELE, [L. s.]

"Commissioners.

"Registered in the county clerk's office.

"WILLIAM ROSS, Jr., *County Clerk.*"

The first section of the act provides that, upon the application in writing of twelve or more resident freeholders, the circuit court of the county shall appoint three resident freeholders to be commissioners. Section 2 reads as follows: "That it shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, such sum of money, not exceeding ten per centum of the valuation of the real estate and landed property of such township, to be ascertained by the assessment-rolls thereof, respectively, for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor under their hands and seals, respectively. The bonds so to be executed may be in such sums, and payable at such times and places, as the said commissioners and their successors may deem expedient; but no such debt shall be contracted or bonds issued by said commissioners, of or for either of said townships, until the written consent

shall have been obtained of the majority of the tax-payers of such township, or their legal representatives, appearing upon the last assessment-roll, as shall represent a majority of the landed property of such township (including lands owned by non-residents) appearing upon the last assessment-roll of such township. Such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of the said railroad company, and the signatures shall be proved by one or more of the commissioners. The fact that the persons signing such consent are a majority of the tax-payers of such township, and represent a majority of the real property of such township, shall be proved by the affidavit of the assessor of such township indorsed upon or annexed to such written consent, and the assessor of such township is hereby required to perform such service. Such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town clerk's office of such township, and the same, or a certified copy thereof, shall be evidence of the facts therein contained, and received as evidence in any court of this state, and before any judge or justice thereof." By section 3 these commissioners were authorized to dispose of the bonds, and invest the money in railroad stock in the name of the township, to subscribe for and purchase stock in the railroad company, and to act at stockholders' meetings. Section 14 provides "that all bonds issued in accordance with the provisions of this act shall be registered in the office of the county clerk of the county in which the township is situated issuing the same, and the words 'Registered in the county clerk's office' shall be printed or written across the face of each bond, attested by the signature of the county clerk when so registered, and no bond shall be valid unless so registered."

It is conceded that the commissioners were duly appointed; that the issue of bonds was not in excess of the amount authorized by the statute; that a paper purporting to contain the consent of the requisite number of tax-payers, duly verified by the affidavit of the township assessor, was filed in the office of the clerk of the county; and that the plaintiffs were *bona fide* holders. But the contention is that the consent roll did not in fact contain the requisite number of tax-payers, and that the affidavit of the assessor

was not true; also that the commissioners did not borrow any money on the bonds, but disposed of them without lawful consideration. The circuit court held that these defenses were unavailing against *bona fide* holders of the bonds; and with that ruling we concur. Indeed, all the questions which were earnestly presented and argued by counsel for plaintiffs in error have been often considered and decided by this court. The act gave the commissioners power, under certain conditions, to issue the bonds. The recitals therein show that they were issued "in pursuance" of the act, and the bonds were all duly registered as required. The case of *Montclair v. Ramsdell*, 107 U. S. 147, 158; 2 Sup. Ct. Rep. 391, was a suit on bonds in form like the ones in suit, and issued under a statute practically identical. The validity of those bonds was sustained; and in the course of his opinion, speaking for the court, Mr. Justice Harlan says: "Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show, to entitle him *prima facie* to judgment, was the due appointment of the commissioners, and the execution by them in fact of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were in fact performed before the bonds were issued. The one was presumed from the possession of the bonds, and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute." See, also, the cases of *Bernards Tp. v. Stebbins*, 109 U. S. 341; 3 Sup. Ct. Rep. 252, and *New Providence v. Halsey*, 117 U. S. 336; 6 Sup. Ct. Rep. 764, in which bonds issued either under the act before us or that referred to in 107 U. S. 147, 158; 2 Sup. Ct. Rep. 391, *supra*, were considered by the court. Reference also may be made to two New Jersey cases (*Cotton v. New Providence*, 47 N. J. Law, 401; 2 Atl. Rep'r, 253, and *Insurance Co. v. Elizabeth*, 42 N. J. Law, 235).

It were useless to refer to the long list of cases in which recitals like these have been held sufficient to sustain bonds in the hands

of *bona fide* holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the circuit court — special agents, as it were, for the specific purpose; that the statute does not in terms give them authority to determine whether the preliminary conditions have been complied with; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But, though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality. But these special commissioners were not the only officers of the township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records, the affidavit of the township assessor to the consent required would have been found; and on the face of the bonds it appears that the county clerk of the county has added his official certificate to their validity, so that the acts of general, as well as of special, officers and agents of the township, are the foundation upon which rests the validity of these bonds. While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon v. Jennings*, 119 U. S. 74, 92; 7 Sup. Ct. Rep'r, 124, the rule is thus stated by Mr. Justice Blatchford: "Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the 'corporate authorities' to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If

they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with." Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far toward destroying the market value of municipal securities.

We see no error in the ruling of the circuit court, and its judgment is, therefore, affirmed.

Field, J., took no part in the decision of this case.

See *Brown v. Milliken*, 1 Am. R. R. & Corp. Rep. 8, and note.

MULLER V. SOUTHERN PACIFIC RY. Co.

(23 Pac. R. 285; 83 Cal. 240.)

1. EMINENT DOMAIN. DAMAGES WHEN PART OF STREET TAKEN FOR RAILROAD PURPOSES. The defendant took a part of the street in front of plaintiff's lot for railroad purposes. The plaintiff owned the fee of the street. In an action to recover for the taking, it was held that the plaintiff was entitled to recover the value of the part taken, subject to the easement for a public street, together with damages to the part not taken and to the abutting lot.

2. OFFERS TO PURCHASE. *Bona fide* offers made for the purchase of the lot are competent evidence to prove value.

3. DAMAGES TO THE PART NOT TAKEN. The damage to the part not taken is to be ascertained by taking the difference between its value before the defendant entered to build its road and its value after the road was completed. If there was no depreciation there was no damage.

4. It is not competent to consider what the property would have been worth if the railroad had been constructed in some other street.

5. VALUE, HOW ESTIMATED. In arriving at the value of property all its capabilities are to be taken into consideration. The same considerations are to be regarded as in a sale between private parties.

6. DAMAGE TO PRESENT USE. If the abutting lot is rendered less valuable by the obstruction, because the owner is using the lot for a particular business, and the obstruction renders the lot less valuable for that business, such damage may be considered.

R. B. Canfield for appellant. *B. F. Thomas* for respondent.

THORNTON, J. Action to recover damages for a strip of land, situate in the city of Santa Barbara, taken by defendant on which to build its road, and for damage to the abutting lot not taken.

Judgment passed for plaintiff, and defendant appeals. It became necessary to prove the boundaries of the land of plaintiff, in order to adjust the damages suffered. The official map of the city of Santa Barbara was produced. The lot is situate on Gutierrez street, in that city. There was a controversy in regard to the line of the street, and it became necessary to prove it. No beginning point was designated or shown on the map. To show where the beginning point was (the map appeared to have been made by one Haley, in pursuance of a survey of the city, showing streets, etc., made by him), the plaintiffs called F. N. Gutierrez, and put to him this question: "Well, have you learned from reputation, hearsay or otherwise as to where the initial point was in the making of this survey? Defendants objected to the question on the ground that it called for hearsay and incompetent testimony. That common reputation or hearsay is admissible to establish a boundary line of general and public interest, we think, is settled at common law, and in this state by statute. Code Civil Proc., § 1870, subd. 11. Such reputation which is hearsay must have existed before the controversy has arisen. We think that the objection to the competency of the question on the ground that it was hearsay was not well taken; and this is, in our opinion, all that the objection amounted to. The question, as a preliminary one, was permissible. Probably, the further examination might have brought out testimony which was inadmissible; but this does not make the question improper. There was no error in allowing the question. We add, on this point, that, if the boundary may be proved by hearsay, certainly the beginning point—the most material point—can be so proved. The greater includes the less.

The testimony of Muller as to offers made for the purchase of the lot of land above mentioned not taken was admissible to prove its value, and the question properly allowed the issue of damages. *Bona fide* offers for property afford some test as to its value, and are, we think, admissible. *Harrison v. Glover*, 72 N. Y. 451. What weight such testimony is entitled to is for the jury; so, also, the *bona fides* of the offer is a question of fact to be determined by the jury. A cross-examination as to all the circumstances of the offer will show to the jury what weight is to be given to the testimony.

We must consider this a case where the fee of one-half of the street is in the plaintiff; for the jury, by their verdict, have so affirmed. Hence the plaintiff is entitled to recover the value of the land taken, subject to the easement for a public street, and, in addition, damages to the part not taken, and to the abutting lot, by reason of the part taken for railroad purposes. The value of the land taken is that which it had when the defendant entered to construct its road. The value of the part not taken is to be determined by ascertaining the value of such part when the defendant entered to build its road, and by deducting from it, if a depreciation occurred, the value when the road was completed. If there had been no depreciation when the road was completed, there has been no damage, and none can be allowed. On this subject, see the following cases: *Imlay v. Railroad Co.*, 26 Conn. 249; *Kucheman v. Railway Co.*, 46 Iowa, 366; *Railroad Co. v. Esterle*, 13 Bush. 667; *In re Coney Island R. Co.*, 13 Hun, 345; 16 Hun, 261; *In re New York Cent. R. Co.*, 15 Hun, 63; *Henderson v. Railroad Co.*, 78 N. Y. 423; *Hegar v. Railway Co.*, 26 Wis. 624. We are inclined to think, in this case, that the difference between the value of the lot when the defendant entered to construct its road and the value when the road was completed will show what the plaintiff is entitled to recover. The value of the land taken on the street, when the street is subject to public easement, is so small as to be scarcely appreciable. There seems no probability of the termination of the easement, and until that is terminated the plaintiffs can only use the land for the purposes of a street. The depreciation of the abutting lot is caused only by the obstruction to the street by the embankment raised on it by defendant, and thus impairing plaintiffs' use of the street in connection with his lot. We do not intend, however, to say that plaintiffs cannot recover the proved value of the land taken.

The court below admitted evidence as to the value the lot would have had, had the railroad been built on some other street in Santa Barbara. This could only have been admitted as affecting the damage to the lot by the defendant. We cannot see on what view or principle this evidence was admitted. The damage to plaintiff must be estimated on the actual facts of the case; not on any speculative theory of what might have been the result if something had occurred which in fact did not occur. It is diffi-

cult to see what effect this evidence could have had on the subject of damage. If the court intended to allow the jury to add to the difference in values above pointed out as legitimately allowable the enhancement in value which would have occurred had the road been built on some other street in the city, it was a departure from the just rule. The damage allowed is not a failure to realize a profit which, under another state of matters, might have been realized, but the loss actually suffered; and the defendant is only called on to make compensation for that loss. The court was requested by defendant to tell the jury that, "in estimating the damage to the portion of plaintiff's land not taken by the railroad, you must not consider what the value of the land would have been if the railroad had been constructed through the city, but along some other street than Gutierrez street." For the reasons above given the admission of the evidence was an error. The failure to give the requested direction above quoted was also an error, as it in effect allowed the jury to take into consideration the question of value as affected by the building of the road on a different street, the consideration of which tended to lead them (the jury) away from the true rule. We see nothing in this case which raises the question of setting off benefits to plaintiffs against damages suffered by them; and we say nothing in regard to the point, except to refer to the former decision of this court in *Railroad Co. v. Porter*, 74 Cal. 261; 15 Pac. Rep'r, 774, which meets our approval.

In arriving at the value of the land, all its capabilities, or the uses to which it is adapted, should be taken into consideration. These capabilities are estimated by a purchaser, and we cannot see why evidence in regard to them is not admissible. The same considerations are to be regarded as in a sale of land between private parties. *Town Co. v. Neale*, 78 Cal. 67; 20 Pac. Rep'r, 372; *Boom Co. v. Patterson*, 98 U. S. 409; and cases cited in 3 Suth. Dam., p. 441, note 4. If the abutting lot is rendered less valuable by the obstruction because the owner is using the lot for a particular business, and the obstruction renders the lot less value for that business, we do not see why that should not be considered on the question of damage. This is a use to which the lot may be put, and for which it is actually employed. Such damage is actually incurred, and should be allowed. *Driver v.*

Railroad Co., 32 Wis. 569. We find no error in the record, save the one pointed out; and for that error the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

So ordered.

I concur: Sharpenstein, J.

McFARLAND, J. I concur in the judgment on the ground upon which the reversal is based in the opinion of Mr. Justice Thornton. With respect to the views therein expressed on other points I express no opinion.

1. **Railroads in streets.**—For a full discussion of the subject and of the rights and remedies of abutting owners see *McQuaid v. Portland, etc., Ry. Co.*, 1 Am. R. R. & Corp. Rep. 34, and note pp. 47-54. See, also, *Harback v. Des Moines, etc., Ry. Co.*, 1 Am. R. R. & Corp. Rep. 449; *Millvale v. Evergreen R. Co.*, 1 Am. R. R. & Corp. Rep. 151.

2. **Offers to buy or sell as evidence of value.**—In proceedings for the condemnation of property, it is generally held incompetent for the owner to prove what he has been offered for the property in question or what others were willing to give for it. *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Selma, etc., R. Co. v. Keith*, 53 Ga. 178; *St. Joseph, etc., R. Co. v. Orr*, 8 Kans. 419; *Fowler v. County Coms.*, 6 Allen, 92; *Dickenson v. Fitch*, 13 Gray, 546; *Watson v. Milwaukee, etc., R. Co.*, 57 Wis. 332; *Louisville, etc., R. Co. v. Ryan*, 64 Miss. 399. Nor is it competent to prove offers for adjacent and similar property. *Davis v. Charles River Branch R. Co.*, 11 Cush. 506; *Lehmicke v. St. Paul, etc., R. Co.*, 19 Minn. 464; *Concord R. Co. v. Greeley*, 23 N. H. 237. Or the price at which the owners of such property have offered it for sale. *Winisimet Co. v. Greuby*, 111 Mass. 543; *Montclair R. Co. v. Benson*, 36 N. J. L. 557; *Drury v. Midland R. Co.*, 127 Mass. 571.

Offers between the parties to the proceedings are not competent because they are in the nature of an attempt to compromise. *Upton v. South Branch Reading R. Co.*, 8 Cush. 600; *Chicago, etc., R. Co. v. Catholic Bishop*, 119 Ill. 525.

What the owner has offered to take for the property while unaffected by the proceedings is competent evidence against him. *East Brandywine, etc., R. Co. v. Rauck*, 78 Penn. St. 454; *Springfield v. Schmook*, 68 Mo. 394.

TAGGART ET AL. V. NEWPORT STREET RAILWAY COMPANY.

(19 Atl. R. 326; R. I. —.)

1. **STREET RAILWAYS. RIGHT TO ADOPT ELECTRICITY AS A MOTIVE POWER.** The charter of a street railway company provided that its road may be operated "with steam, horses or other power as the councils of said city and

towns may from time to time direct." Held, that the use of electricity might be authorized even through the word "steam" should be stricken out as contended by counsel.

2. WHETHER USE OF ELECTRICITY IS PROHIBITED BY ACT OF INCORPORATION. The act provided that "said corporation shall not incur any portion of the streets or highways not occupied by said tracks." Held, that this did not prohibit the erection of poles and wires for the use of electricity.

3. EMINENT DOMAIN. ADDITIONAL SERVITUDE. A street railroad, whether operated by horse-power or electricity, is not an additional burden on the fee of the street for which the abutting owners are entitled to compensation. The same is true of the poles and wires erected for the application of electric power.

Julien L. Daires, Arnold Green and Patrick J. Galvin for complainants. *Francis B. Peckham and Darius Baker* for respondent.

DUFFEE, C. J. This bill is brought by the complainants as abutters on certain streets in the city of Newport along and over which the tracks or rails of the defendant company's street railway have been laid. The object is to have the company enjoined from erecting or maintaining certain poles and wires in the streets in front of their estates. Said poles were erected to support said wire over said tracks for the conduction of electricity, which is used as a motor for the passenger-cars traversing said tracks. The poles are placed along the margins of the sidewalks of said streets, about one hundred and twenty feet apart, and were placed so by permission of the city council of the city of Newport, given by ordinance. The case was submitted on bill and answer, no replication having been filed. The bill alleges several grounds of relief. We will consider them severally, as alleged.

The first ground is that the company did not give notice as required by section 2 of the act of incorporation. Said section provides for notice to abutters, to be given by publication and posting, at least fourteen days before the location of tracks proposed to be laid. The bill alleges that the purpose for which the notice was required was to apprise the abutters "of the nature and extent of the proposed use of the streets and highways," and to afford them an opportunity to appear before the city and town councils having power over the matter, and be heard in relation thereto. The bill admits that a notice was given in August and September, A. D. 1888, but avers that it was defective, in that

it did not set forth that any other than horse-power was intended to be used. The answer states that said notice did not refer to the matter of power, and maintains that any reference to it therein was unnecessary, since section 2 prescribes notice only before action in regard to the location of the tracks. This is so. It is section 5 that relates to the power. That section provides that "said tracks or road shall be operated and used by said corporation with steam, horse or other power, as the councils of said city and towns may from time to time direct." No notice is required before such direction. The ordinance in regard to location was passed January 24, A. D. 1889. It permitted the use of horse-power only. The ordinance permitting the use of electricity was passed March 5, A. D. 1889. It seems to us that the latter ordinance was clearly authorized by section 5, in the words above quoted. The previous location of the tracks was not affected thereby.

The second ground alleged is that the right to use electricity is not given. The language in regard to the power to be used is that above granted, namely, that the road shall be operated "with steam, horse or other power, as the councils of said city and towns may from time to time direct." The complainants contend that the word "steam" must be struck out, because it has been decided that steam cannot be used without compensation to the owners of the fee for the new servitude imposed, and no compensation is provided for, and because, "steam" being struck out, "other power" must be construed to mean other power similar to horse-power, *i. e.*, other animal power. We do not find the argument convincing. Allowing that "steam" must be struck out for the reason given, it does not follow, in our opinion, that "other power" must be construed to mean other animal power. Horse-power is the only animal power which has ever been used for the traction of street railway cars in our northern cities, and it is the only animal power which could have occurred to the general assembly as fit to be used. The suggestion that "other power" may mean mules cannot be entertained. The act of incorporation was passed in the winter of 1885, when the idea that electricity might be brought into use as a motor was already familiar; and nothing seems more probable than that the words

"other power" were inserted with a view to its possible employment. We do not think the second ground valid.

The third ground is that the erection of the poles on the sidewalks is, in effect, prohibited by the act of incorporation. The seventh section, which relates to the repairs of the streets where the tracks are, and to damages for negligence on the part of the company, concludes as follows, to-wit: "And said corporation shall not incumber any portion of the streets or highways not occupied by said tracks." The poles are certainly in a portion of the streets not occupied by the tracks, but do they "incumber" that portion, in the meaning of the word as it is used? To incumber, according to Webster, is "to impede the motion or action of, as with a burden; to weigh down; to obstruct, embarrass or perplex." To incumber, as used in said section 7, doubtless means to obstruct or hinder travel, by putting things in the way of it. The poles are very slightly in the way of travel, being placed, as hitching-posts, lamp-posts, electric-light poles, telegraph and telephone poles are placed, near the front margins of the sidewalks. We are not inclined to say, however, that they do not incumber because they are placed as they are, but only that it does not follow that they incumber because they are so placed. Take, for instance, a lamp-post, or an electric-light pole. It is slightly in the way, and, if it served no useful purpose in regard to the street, might partly be deemed to incumber it. But it supports a lamp or an electric light which illuminates the street at night, and so improves the street for its proper uses. It is not, therefore, an "incumbrance," in any proper sense of the word. The real question is, as it seems to us, whether the words, "and said corporation shall not incumber any portion of the streets or highways occupied by said tracks," were intended to restrain the city council of the city of Newport from authorizing the use of electricity for a motor, in the manner in which it is used by the company. We have already decided that the council has power, by section 5, to authorize the use of electricity; so that the question relates only to the manner of using, and is whether the council has power to authorize the use in said manner. It seems to us that the provision that the tracks or road shall be operated by "steam, horse or other power, as the councils of said city and towns may from time to time direct," is broad enough to em-

power said councils, not only to authorize the use of electricity as a motor, but also to authorize its use by means of any system of application which it approves as suitable; and it further seems to us that the concluding words of section 7 have their full meaning when applied to the company acting of itself, without extending them to city and town councils acting under section five, or to the company acting under said section, as authorized by such councils. It appears that said concluding words were copied from charters of street railway companies which were only authorized to use horse-power, and in which, of course, they could have had no such application as is here contended for. It also appears from the allegations of the answer that the mode of using electricity which has been adopted is the only mode in which it can be successfully used by the company for the operation of the road. These are things which confirm our view. Our conclusion is that the power conferred by section 5 is not qualified by the concluding words of section 7, and that the poles complained of, having been erected, under section 5, as part of the apparatus for supplying the railway with its motive power, are to be regarded, not as incumbering the streets, but as ministering to their uses, and as increasing the facilities for travel which they afford to the public.

The fourth ground alleged is that if the act of incorporation authorizes the use of electricity for the operation of said street railway, and the erection of the poles as ancillary thereto, it is unconstitutional and void because it authorizes the imposition of an additional servitude upon the streets, without providing for any additional compensation to the owners of the fee of said streets. We think it is settled by the greater weight of decision that a railroad constructed in a street or highway, and operated by steam, in the usual manner, imposes new servitude, and entitles the owner of the fee to an additional compensation, but that a street railway operated by horse-power, as such street railways are ordinarily operated, does not impose any new servitude, and does not entitle the owner of the fee to any additional compensation. *Mills Em. Dom.*, § 205, and cases cited; *Ang. & D. Highw.*, § 91d, note 1, and cases cited; *Newell v. Railway Co.*, 35 Minn. 112; 27 N. W. Rep'r, 839; also 25 Am. Law Reg. (N. S.) 431, and cases cited in the note. The distinction is often stated as a dis-

inction between steam and horse railroads, but the distinction properly rests, not on any difference in motive power, but in the different effects produced by them, respectively, on the highways or streets which they occupy. A steam railroad is held to impose a new servitude, not because it is operated by steam, but because it is so operated as to be incompatible with the use of the street, or, in other words, so as practically to exclude the usual modes of use. *Pierce Railr.* 234. A steam railroad on a street, so operated as to be consistent with the use of the street in the usual modes, has been held not to impose a new servitude. *Newell v. Railway Co.*, *supra*; *Fulton v. Transfer Co.*, 85 Ky. 640; 4 S. W. Rep'r, 332. It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. *Briggs v. Railroad Co.*, 79 Me. 363; 10 Atl. Rep'r, 47. A steam railroad, as ordinarily operated, it has been said, comes into serious conflict with the usual modes of travel, and is a perpetual embarrassment to them, in greater or less degree, according as the business of the railroad is greater or less, or as the running of the trains is more or less frequent, whereas, the ordinary street railway, instead of adding a new servitude to the street, operates in furtherance of its original uses, and, instead of being an embarrassment, relieves the pressure of local business and local travel. *Railroad Co. v. Heisel*, 38 Mich. 62. See, also, *Attorney-General v. Railroad Co.*, 125 Mass. 515; *Citizens Coach Co. v. Camden H. R. Co.*, 33 N. J. Eq. 267; *Elliott v. Railroad Co.*, 32 Conn. 579; *Hobart v. Railroad Co.*, 27 Wis. 194. The only considerable privilege which the horse-car has over other vehicles is that, being confined to its tracks, it cannot turn aside for other vehicles, while they are forced to turn aside for it; but this is an incidental matter, insufficient to make the horse railroad a new servitude. *Shea v. Railroad Co.*, 44 Cal. 414.

The street railway here complained of is operated neither by steam nor horse-power, but by electricity. It does not appear, however, that it occupies the streets or highways any more exclusively than if it were operated by horse-power. The answer avers that "electricity, besides being as safe and as easily managed as horse-power for the propulsion of street-cars, is more quiet, more cleanly and more convenient than horses, both for residents on the streets used by said cars, and for the public

generally, and also causes much less wear and injury to the streets and highways than is occasioned by street-cars of which horses are the motive power." These averments, the case being heard on the bill and answer, must be taken as true. We see no reason to doubt their truth. It is urged that electricity is a very dangerous force, and that the court will take judicial notice of its dangerousness. The court will take judicial notice that electricity, developed to some high degree of intensity, is exceedingly dangerous, and even fatally so, to men or animals, when it is brought in contact with them; but the court has no judicial knowledge that, as used by the defendant company, it is dangerous. The answer denies that it is dangerous to either life or property. It is also urged that the cars, moving apparently without the application of external force, alarm and frighten horses. This, so far as it is alleged in the bill, is denied in the answer. We see no reason to suppose that this form of danger is so great that on account of it the railway should be regarded as an additional servitude. The answer alleges that a great many street railways operated by electricity, in the same manner as the railway of the defendant is operated, are in use in various towns and cities in different states, and that many others are in process of construction.

Reference has been made to cases which hold that telegraph or telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation; and from these cases it is urged that the railway here complained of is an additional servitude, by reason of the poles and wires which communicate its motive powers. There are cases which hold as stated, and there are cases which hold otherwise. But, assuming that telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street railway likewise create a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets, as such, in that they communicate the power by which the street-cars are propelled. It has been held, for reasons which we consider irre-

fragable, that a telegraph erected by a railroad company, within its location, for the purposes of its railroad, to increase the safety and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired. *Telegraph Co. v. Rich*, 19 Kans. 517. Our conclusion is that the complainants are not entitled to the relief prayed for on the ground alleged, and that the bill be dismissed, with costs.

1. **Right of a street railroad company to adopt steam or electricity as a motive power.**—In *People, ex rel. Third Avenue R. Co., v. Newton*, 113 N. Y. 396, the facts were as follows: In 1852, the city of New York granted to certain persons the right to lay a double track railroad upon certain streets in that city, under the direction of the street commissioner, with the usual conditions in regard to laying its tracks and keeping in repair the space between the tracks, and with the further condition, that “no steam-power be used on any part of the road, for propelling cars.” Afterward these rights became vested in the relator corporation, which constructed and operated the road in the usual manner of horse railroads. In 1887, the relator determined to adopt the cable system of operating its road and applied to the defendant, as commissioner of public works, for a permit to open the streets for the purpose of putting in the proper substructure for that system. The defendant refused such permission and, thereupon, the company applied for a *mandamus* to compel the defendant to grant the permit. The special term granted the writ but the general term reversed the order and denied the writ. The court of appeals affirmed the latter order on the ground that both the grant of authority from the city and the general law under which the relator was incorporated, contemplated only a road whose operations, by way of structure or otherwise, should be limited to the surface of the roadway, and that neither gave any authority to open or excavate or use below the existing surface. The court say:

“The General Railroad Law (Laws 1850, chap. 140) gives no authority for the construction of street railroads (§ 28, subd. 5), but if any right is gained by an organization under that act the company is required after construction to restore the street touched by them ‘to its former state or to such state as not unnecessarily to have impaired its usefulness.’ The only disturbance of the street, therefore, which is allowed by the charter or the statute is the temporary excavation required for imbedding the ties and stringers which support the track and rails, and when they are put in place the work of restoration leaves the surface of the street unbroken, the passage-way even and the substructure solid. Such is the road which the relator was authorized to construct and which it did construct. In February, 1887, however, with no additional power or grant from the legislature or the municipal authorities, it resolved, in the language of its directors, ‘to adopt and,’ as they say, ‘did adopt the cable system as a means of furnishing a motive power for the operation and running of cars along its route.’ We are not informed of the component parts of that system. But the relator, in order to carry forward its scheme, as disclosed by the action of its directors, demanded from the commissioner a permit, as something to which it was of right entitled, to

make immediate excavations in and at frequent intervals of space across the public streets through its entire route. No license or word of permission to do so can be found in the charter. The road was completed. The relator had then no right to again disturb the surface of the streets, except for necessary repairs and replacing of its ties and rails as occasion might require for the proper maintenance of its road. That power it had. No more. It now, however, asserts a legal right to make excavations, not for any of the purposes of its track or roadway or the foundation of either, but for the purpose of laying a cable in each track between the present rails as motive power for its cars by the agency of steam from stationary engines. A mere statement of the proposition should be a sufficient answer to the claim. To open a city street for the construction of a surface railroad track, or its reparation, and to open that street for the introduction of a power to operate the road, would seem to be separate and distinct things. In the first the excavation ends with the construction, the material of the street is replaced, or, in lieu of it, some other substance which restores the surface to its original unbroken condition and usefulness and leaves all below the surface to such uses as the municipality may require.

"In the other case as the record discloses, the cable requires a conduit of mason work, the necessary excavation for which, on a straight road without curves, is six feet wide and from four to five feet deep; where there is a double track there must be two of these trenches, and at intervals of thirty-five feet along the whole distance they must go still deeper for drainage, and where there are curves the width of the excavation must be, at least, from twelve to fifteen feet; at a corner the pit will be thirty feet in width, and at the engine-houses, whence the cable extends to the conduit in the street, it will be necessary to excavate the entire street from the engine-room out to and beyond the track furthest from it. None of these things are required for the construction of a street surface railroad; none of them affect even its operation. They relate to some act or thing to be done below the surface. Moreover the entire surface is never to be restored — a slot opening from one-half to five-eighths of an inch will remain through the entire length of each track — an opening sufficient to receive the calk of a horseshoe and be the occasion of injury — to receive water and communicate frost to the water or gas-pipes or other pipes in the neighborhood of the trenches. Other consequences follow. It is enough, however, that the slot furnishes an obstruction to the usual and ordinary use of the street for the traffic and travel, whether the horse moves along or across the track, as he may lawfully do." Pages 401-408. * * *

"My conclusion is that a permanent structure below the surface is not covered by the grant for a track to be placed on the surface, with a temporary opening for its necessary foundation, and hence that the occupation of the street by the proposed structure of the relator is not within any right acquired by the resolution on Van Schaick's contract, as confirmed by the act of 1854, and that if allowed it would be subversive of the rights of the city. This view of the relator's case makes it unnecessary to inquire whether the declaration contained in the grant, that 'no steam-power be used on any part of the road for propelling cars,' operates as a prohibition against the system sought to be in-

roduced by the relator and for which alone excavations are necessary." Page 406.

A company was chartered by the legislature "to locate, construct, maintain and operate, *with horse-power or locomotive-cars*, from the city of Chicago to any point in the town of Evanston, a railroad, with single or double track, turnouts, sidings, depots and all other necessary appliances." The city of Chicago granted it authority to construct and operate a road on certain streets with horse-power only. This grant was accepted by the company. It was held that the city might afterward lawfully authorize the use of steam-power by the company. *McCartney v. Chicago & Evanston R. Co.*, 112 Ill. 611. The court say:

"The only possible foundation which we are able to see for this claim made by appellants, is that the charter authority is but to build either a horse railroad or a steam railroad, that there was an option with the company to build either kind of road, but that it was an option which could only be once exercised, and that, therefore, when the company accepted the ordinance permitting the use of animal power, only, within the city, that was an exercise of its option to construct within the city a horse railroad; that there remained no further option on the subject, and that under the charter, the road within the city must ever afterward remain a horse railroad. We cannot adopt this construction of the charter. The power given by the charter was to operate the road to be constructed, with 'horse-power or locomotive-cars.' We read this as giving an option to the company to use either animal power or steam-power or both, upon their road, or any part of it; that this was a continuing option, which might be exercised from time to time; that after the use, for a time, of either kind of power, the other kind might be substituted, as the company saw fit; so that when the common council gave to the company permission to use, within the city, only animal power, there could be, under that permission, only the authority to use that kind of power within the city; but still the right remained, under the charter, to use steam-power within the city whenever the city authorities should give permission to do so." *McCartney et al. v. C. & E. R. Co. et al.*, 112 Ill. 611, 630-1.

The right of a street railroad company to substitute steam for horse-power came in question in *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207. The views of the court on the question appear in the following quotation:

"With respect to the remaining questions little need be said. It is conceded the company's charter authorizes it to maintain and operate a street railway along and over the street in question, and it is contended that, inasmuch as the charter is silent as to the character of the power to be used in propelling the company's cars, the company has the option to use for that purpose either steam or horse-power, as it may prefer. We think in such case it would be more reasonable to hold the legislature intended the company should use that kind of motive power in propelling its cars which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in this state. Giving the charter this construction, horse, and not steam, power was clearly intended.

"But outside of this consideration, we think it sufficiently appears, upon

the face of the act itself, that horse, and not steam, power was intended by the legislature. The title of the company's charter is in these words: 'An act to promote the construction of *horse railways* in the city of Chicago.' The constitution then in force contained this provision: 'No private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title.' In conformity with this constitutional provision, the company's charter contained but one subject, namely, '*horse railways*,' and that was expressed in its title. No allusion, either in the title or body of the act, is made to steam railways, and to hold the legislature intended to include the latter as well as the former kind of railways, would be, in effect, to hold that that body intended to violate the constitutional provision just cited, and this we are not at liberty to do. We think it clear both from the title and body of the act, that its provisions relate only to horse railways, and hence the use of steam as a propelling power could not have been intended by the legislature." *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207, 213.

In *Stanley v. City of Davenport*, 54 Iowa, 463, the city granted the right to use a steam-motor on a certain street for thirty days on probation. The motor was used in accordance with the permit. The plaintiff's horse was frightened by the motor and she was thrown out and injured. In a suit for damages and on the question of the right of the city to grant such permit the court says:

"The remaining question is, whether the city had the authority, in the absence of a grant from the general assembly, to authorize or permit the use of the steam-motor on Brady street in said city. If such power did not exist, the permission given could well be styled negligence, for which the city should be held responsible. Unless the city can shield itself by reason of its authority in the premises, the permission to use the motor on the street constituted negligence. That it was an experiment is not material. If the power existed, it matters not whether the authorized use was for a long or short period of time.

"The defendant was organized under a special charter, and it is stipulated by counsel that neither the charter nor ordinances of the city expressly prohibit the street railroad company 'from using other than animal power in operating its road,' nor does the charter or ordinances contain a grant to that effect. Therefore, we think it must be true the street railway company had no right to use or authorize the use of steam on its track; hence the application to the city council, and the necessity that it should grant the requisite permission.

"The charter empowers the defendant to 'open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve and keep in repair, streets, avenues and alleys.' That the requisite power is not contained in the charter we regard as beyond serious controversy. We feel the more certain of this because the learned counsel for the city does not claim such authority is contained therein. It may be that cities organized under the General Incorporation Law have such authority; if so, it is because there is a statute to that effect. Code, § 464. Such statute, however, is not applicable to this defendant.

"The fee of the streets is in the city, and yet it is held in trust for the use

and benefit of the public. The city does not have the authority to sell and convey a title held by it or authorize the streets to be used for private purposes. Nor can it, without legislative authority, grant the use of a street for a public purpose, which renders it dangerous for the public to travel over it in any other manner. The power partakes of that of eminent domain, which, under our government, can only be granted by the law-making power of the state.

"Streets and highways are under the exclusive control of the general assembly. It matters not if the fee of the streets be in the city, it has no authority to control or grant rights and privileges thereto or thereon, unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the state. A distinction has been drawn between a railway operated by horse and steam-power, and whether the defendant may authorize the former and not the latter is not in this case, and we only allude thereto lest we may be misunderstood.

"The strong current of the authorities, as we understand, is in accord with the views herein expressed. 2 Dill. Mun. Corp., 567, 568; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Milshew v. Sharp*, 27 N. Y. 611; *Commonwealth v. W. E. R. Co.*, 27 Penn. St. 344; *Protzman v. I. C. R. Co.*, 9 Ind. 468; *State v. Inhabitants of Trenton*, 26 N. J. L. 88; *Memphis City R. Co. v. Memphis*, 4 Coldw. (Tenn.) 406." p. 467.

2. A horse railway is not an additional burden on the fee of a street.—This is the universal doctrine with the exception of the state of New York. *Carson v. Central R. Co.*, 35 Cal. 325; *Market Street Ry. Co. v. Central R. Co.*, 51 Cal. 583; *Elliott v. Fair Haven & Westville R. Co.*, 33 Conn. 579; *Savannah, etc., R. Co. v. Savannah*, 45 Ga. 602; *Eichels v. Evansville Street Ry. Co.*, 78 Ind. 261; *Clinton v. Clinton & Lyons Horse Ry. Co.*, 37 Iowa, 61; *Stange v. Hill & West Dubuque Street Ry. Co.*, 54 Iowa, 669; *Stanley v. Davenport*, 54 Iowa, 463; *Brown v. Duplessis*, 14 La. Ann. 842; *Briggs v. Lewiston, etc., R. Co.*, 79 Me. 363; *Peddicord v. Baltimore, etc., R. Co.*, 34 Md. 463; *Hiss v. Baltimore, etc., Ry. Co.*, 53 Md. 242; *Hodges v. Baltimore Passenger Ry. Co.*, 53 Md. 603; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 75; *Hogencamp v. Same*, 17 N. J. Eq. 83; *Jersey City & Bergen R. Co. v. Jersey City & Hoboken H. R. Co.*, 20 N. J. Eq. 61; *Paterson H. R. Co. v. Paterson*, 24 N. J. Eq. 153; *West Jersey R. Co. v. Cape May, etc., R. Co.*, 34 N. J. Eq. 164; *Street Ry. Co. v. Cumminsville*, 14 Ohio St. 524; *Peterson v. Navy Yard, etc., R. Co.*, 5 Phila. 199; *Texas & Pacific R. Co. v. Rosedale Ry. Co.*, 64 Tex. 80; *Hobart v. Milwaukee City Ry. Co.*, 27 Wis. 194; *Van Bokelen v. Brooklyn City Ry. Co.*, 5 Blatch. 379. The contrary view was established in *Craig v. Rochester City, etc., R. Co.*, 39 N. Y. 404; *S. C.*, 39 Barb. 494. Other New York cases are the following: *Davis v. New York*, 14 N. Y. 506; *Milhan v. Sharp*, 15 Barb. 193; 27 N. Y. 611; *Wetmore v. Story*, 23 Barb. 414; *Mason v. Brooklyn City, etc., R. Co.*, 35 Barb. 373; *People v. Law*, 34 Barb. 494; *People v. Kerr*, 37 Barb. 357; 27 N. Y. 188; 25 How. Pr. 258; *Kellinger v. Forty-second Street R. Co.*, 50 N. Y. 206; *Mahady v. Brunswick R. Co.*, 91 N. Y. 148.

The views of the writer upon this subject are expressed in his work on *Eminent Domain* as follows:

"That a difference exists between the ordinary horse railway and the ordinary steam railway is obvious; but is the difference any thing more than one of degree? The steam road with its engines and cars of usual size and weight, might be successfully operated upon strap rails so laid as to be easily crossed, and as conveniently used longitudinally by ordinary vehicles as the horse railroad track. On the other hand, the cars of the ordinary street railway may be propelled, not only by animal power, but also by steam or electricity, either in the form of a cable, or of a small locomotive. *Craig v. Rochester City etc.*, R. Co., 89 Barb. 494. The manner of laying down the track, the shape and size of the rails, the size and weight of the cars, and the motive power, are all accidental circumstances, all subject to change and modification as new principles are discovered or improvements made. The essential characteristic of both kinds of road is that there is granted to a private corporation or individual an exclusive franchise, right or easement in the soil of the street. *Chicago & Western Ind. R. Co. v. St. Louis, etc.*, R. Co., 15 Ill. App. 587; *C. & N. W. Ry. Co. v. Jefferson*, 14 Ill. App. 615; *Railroad Co. v. Railroad Co.*, 86 Ohio St. 239; *Pennsylvania R. Co.'s Appeal*, 93 Penn. St. 150. To the extent to which the right is private and exclusive, it is foreign to, and subversive of, the character of the street as a public highway. To hold otherwise is, it seems to us, to establish a principle which may lead to the total exclusion of ordinary travel from a public street. If the principle of the horse railroad cases is sound, then a street may be so filled with tracks, with cars running so frequently, as practically to exclude all other travel and traffic from the street. If one track is a legitimate use, any number of tracks is legitimate. It rests simply with the proper public authorities to determine how many tracks will best subserve the public interests. But what may best subserve the public interests may be very detrimental to particular private interests. A street filled from line to line with street railway tracks, upon each of which cars are run at short intervals, propelled it may be by the steam cable, or by some other modern contrivance even more objectionable, would present very few characteristics of the 'common public highway' maintained for the free and common use of all the 'king's subjects.' The fact that street railways are seldom productive of any detriment to adjoining property and deviate but little from the use of the street by ordinary vehicles, should not be made the groundwork of legal rules that prevent compensation, when in fact serious inconvenience and damage result." *Lewis Em. Dom.*, § 124.

In *Newell v. Minneapolis, etc.*, Ry. Co., 35 Minn. 112, a railroad operated with a steam-motor inclosed in a cab, upon T rails and with cars run in trains was held not to be an additional burden upon the street.

A contrary view is generally held as to ordinary steam railroads. *McQuaid v. Portland, etc.*, Ry. Co. (Or.), 1 Am. R. R. & Corp. Rep. 84, and note, p. 47.

3. Whether the poles and wires for operating street-cars by electricity constitute an additional burden on the fee of the street.—In referring to the principal case and to the distinction attempted between a line of poles and wires for a telegraph and for a railway, Judge Dillon says: "The distinction last mentioned is so fine as to be almost impalpable, and it suggests serious doubts

whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement." 2 Dill. Mun. Corp., p. 893.

The better opinion, and the one generally held, is that a telegraph or telephone line is an additional burden upon the land constituting a highway, the fee of which is in the abutting owner, and that it cannot be constructed without compensation to such owner. See *Am. Telephone & Telegraph Co. v. Smith* (Md.), 1 Am. R. R. & Corp. Rep. 73, and note, p. 86, and *Western Union Tel. Co. v. Williams*, post. If this position is sound, there would appear to be no good reason why the lines of poles and wires for operating a railroad should not be regarded also as an additional burden. In the latter case as at present constructed there are two lines of poles instead of one, they are placed much closer together and surmounted by larger wires and cables which run both transversely and longitudinally.

BROWN V. INHABITANTS OF SKOWHEGAN.

(19 Atl. R. 399; 82 Me. 273.)

1. MUNICIPAL CORPORATIONS. DEFECTIVE HIGHWAYS. Towns are not required to render the road passable for the entire width of the whole located limits, or to provide safe and convenient access to them from the premises of adjoining proprietors.

2. WHO IS A TRAVELER ON A HIGHWAY. Along the side of the traveled part of a highway, and within the limits of its location, was an open ditch made for draining off the road. The plaintiff, in passing from a school-house to the road, in the darkness, fell into this ditch, and was injured. Held, that he had not become a traveler upon the road, and the town was not liable for the injury.

Crosby & Crosby for plaintiff. *D. D. Stewart* for defendants.

EMERY, J. The plaintiff was engaged in teaching an evening singing school in a district school-house in the defendant town. The school-house lot adjoined the highway for some six rods. The traveled part of this highway past the school-house was some eighteen feet wide, and free from defects. The wrought part between the ditches was twenty-seven feet wide, and the evidence discloses no defect in all that width. Within the limits of the located highway, along that side of the wrought part, toward the school-house, was a ditch about eighteen inches deep, and extending past the school-house lot. This ditch had been made and was kept open for the drainage of the wrought part of the road.

Near one end of the school-house lot large rocks were in the ditch, forming a crossing which the scholars used, but the rest of the ditch was open and exposed.

One night the plaintiff, returning from his work, in passing in the darkness from the school-house to the street fell into this ditch, and was injured. He claims that the street was defective by reason of this open ditch, and that he is entitled to recover of the town under the statute. He contends that, whatever may be the rule as to ditches passing private buildings, all ditches passing public buildings should be covered, or so guarded that the public, passing from such buildings to the traveled part of the road, need not fall into them.

We do not find any such duty imposed upon towns by the statute, and if not imposed by statute it is not imposed at all. By the statute (R. S., chap. 18, § 52), "highways * * * shall be opened and kept in repair so as to be safe and convenient for travelers. * * * " The statute, being somewhat of a penal nature, is not to be extended by construction. It has always been construed strictly. The court assumes that the legislature has expressed in terms all the duties it meant to impose. It has been held that the town need not open and keep in repair the entire width of the way; that it sufficiently complies with the statute, if it constructs and keeps in repair a smooth, free roadway of sufficient width for teams to pass along, and by one another, without obstruction; and that it is not liable to a traveler injured by his wagon striking a rock within the limits of the highway, but outside of the part purposely fitted for travel. *Perkins v. Fayette*, 68 Me. 152.

We think it would be an unwarrantable extension of the statute to hold that towns must provide safe ingress and egress to and from the roads they make. The statute does not say they must, and we see no reason why they should. Owners or occupants of buildings and lots cannot well keep the public streets in repair, but each abutter can take care of his own approaches, and it is reasonable that he alone should be responsible for them. His right to connect his premises with the traveled part of the public road, by means of suitable roads and crossings, will not be questioned; and it may reasonably be left to him to determine the location and character of such approaches, if any. It was held

in *Philbrick v. Pittston*, 63 Me. 477, in a well-considered opinion, that a person injured by a hole in a plank, crossing over a gutter within the limits of the highway, while passing from a private way into the public way, could not recover of the town for injuries thus received. The plaintiff in that case was within the limits of the street, and was crossing the ditch on his way to the part prepared for travelers, but had not reached it. It was declared in the opinion that it is no part of duty of towns to provide safe and convenient access to their streets from any man's house, lot or garden. See, also, *Leslie v. Lewiston*, 62 Me. 468.

We think the principle thus declared applies as well to school-houses and lots. The fact that these are in the nature of public buildings and places cannot change the principle. Those charged with the care of such buildings and places must care for the approaches. The fact that part of such approaches are within the limits of the location of the highway does not put their care upon the town. Those frequenting such places must use the approaches thus provided, or make their own way. They are not upon the risk of the town until they have reached that part of the road prepared for travelers, and thus become travelers. The duty of the town is only to travelers upon its roads, not to those approaching or leaving its roads. The plaintiff must prove, as indeed he has alleged, that he was traveling upon the road. *Stinson v. Gardiner*, 42 Me. 248; *McCarthy v. Portland*, 67 Me. 167. As was said in *Philbrick v. Pittston*, supra: "He [at the time of the accident] had not reached that part of the street which was appropriated to public travel, or prepared by the town for that purpose." Hence he was not, when hurt, a traveler, and so cannot recover.

Exceptions overruled. Nonsuit confirmed.

Peters, C. J., and Walton, Virgin, Foster and Haskell, JJ., concurred.

Width of highway to be kept in repair.— Towns and cities are not necessarily required to keep the entire width of a highway in repair and fit for travel. As to what is a sufficient and proper width to be kept in a safe condition for travel is a question of fact. *Goeltz v. Ashland*, 1 Am. R. R. & Corp. Rep. 442, and note.

STATE, EX REL. HAMILTON GAS & COKE Co., v. CITY OF HAMILTON.

(23 N.E. R. 935; — Ohio St. —.)

1. GAS COMPANIES. RIGHTS OF, NOT INFRINGED BY THE ERECTION OF PUBLIC GAS-WORKS. A gas company incorporated under the act of May 1, 1852 (1 Swan & C. St. 271), for the purpose of supplying gas for lighting the streets and public and private buildings of a city, under authority from the city council erected gas-works, and laid pipes for long distances, for conducting gas through the streets for public and private consumption. The council regulated, from time to time, the price which such company might charge for gas, and from time to time made contracts with the company for lighting the streets. At the expiration of the last contract no new agreement was entered into, and the city declined to take gas any longer from the company. The company complied with all the provisions of the law of the state relating to gas companies, and with all the requirements of the city council in that behalf. Held, (1) That, although there was no refusal or neglect by the company to comply with the requirement of section 2480 of the Revised Statutes, as to laying pipes and lighting streets, and no neglect by the company to furnish gas to citizens and other consumers, in accordance with the prices fixed by the council, as provided in section 2482 of the Revised Statutes, the city council, under section 2486 of the Revised Statutes, was empowered to erect its own gas-works at the expense of the corporation, or to purchase gas-works already erected therein, whenever it might be deemed expedient and for the public good. (2) That the company acquired no vested rights of which it would be deprived, without due process of law, by the city's erecting its own gas-works. Spear J., dissenting.

Q UO WARRANTO.

David K. Watson, Attorney-General, *Follett & Kelley, Ramsey, Maxwell & Ramsey, Thomas Millikin, A. F. Hume* and *John F. Neilan* for relator. *E. E. Hull*, City Solicitor, *James E. Neal* and *Israel Williams* for defendant.

DICKMAN, J. The facts necessary and sufficient for the determination of the material issue in this action are disclosed by the petition, answer and demurrer to the answer, and are as follows: The Hamilton Gas-light and Coke Company was organized and duly incorporated in the year 1855, under the General Incorporation Act of May 1, 1852, for the purpose of supplying gas for the lighting of the streets and public and private buildings in the city

of Hamilton, Ohio. At the time of its organization, by virtue of the provisions of an ordinance of the city of Hamilton passed in the year 1855, there was granted to the company, and it thereafter had, the use of the streets of the city, for the purpose of laying gas-pipes and mains, and supplying gas to the city and its inhabitants, for the period of twenty years, to-wit, until the year 1875. Since the year 1875 the city has used the gas of the company only in accordance with the terms of various contracts entered into between the city and the company, from time to time, the last of which contracts expired January 1, 1889; and since the last-named date there has been no contract existing between the parties, the city has declined to use the company's gas, and has provided other means for lighting its streets. For the purpose of manufacturing gas, the company erected gas-works, and laid gas-pipes and mains, to the probable extent of thirty miles, throughout the city for the furnishing of gas for public and private consumption. It is conceded by the defendant that the company has complied with all the provisions of the law of Ohio relating to gas companies, and with all the ordinances in that behalf of the city of Hamilton, and is entitled to all the rights, privileges and immunities secured to such companies by the laws of the state. The city of Hamilton is a municipal corporation organized under the laws of the state of Ohio, and had, at the last federal census, a population of twelve thousand one hundred and twenty-two, and a corporate area of about three square miles. On the 4th day of September, 1888, the city, by its council, on the petition of a large number of its inhabitants, duly passed an ordinance providing for the submission to the qualified voters of the question of issuing the city's bonds to the amount of \$150,000, for the purpose of gas-works to be erected by the city. Legal notice having been given, the question was voted upon by the electors at the general election held on the 6th day of November, 1888, and resulted in two thousand four hundred and twelve votes being cast for the issue of bonds, and fifty-nine votes against such issue. Upon that decision of the electors the city council, on the 20th day of November, 1888, adopted a resolution that it was deemed expedient, and for the public good, to erect gas-works at the expense of the corporation. On the 18th day of December, 1888, an ordinance was passed by the council, providing for the issue of bonds, for the purpose of erecting such

works by the city, to the extent of \$150,000. The entire issue was sold for more than the par value thereof, and the proceeds of the sale were turned over to the city treasurer for the erection and completion of the proposed works. On the 7th day of May, 1889, trustees of the gas-works were appointed by the city council, who duly qualified, organized their board and proceeded to the erecting of the works, in accordance with the decision of the citizens and tax payers of the city of Hamilton. The board of trustees so appointed purchased land for the erection thereon of the proposed gas-works, agreed upon plans and details for the construction of such works, entered into contracts for the furnishing of material and the performance of labor, paid large sums of money upon contracts for material furnished and labor performed, and, in the execution of contracts, gas-pipes were extensively laid in the streets of the city. The defendant alleges that the gas-works are being built by the city for the purpose of furnishing the public lighting to the city, and that no action has been taken towards furnishing gas for private consumption; but the defendant cannot say what action, if any, the city will in the future take towards furnishing gas for private consumption.

1. The only material question in this case is whether, upon the facts as above stated, the city of Hamilton has corporate power to erect its own gas-works for the purpose of furnishing the public lighting to the city. The laws relating to gas companies when organized, and in force at the time the Hamilton Gas-light Company was incorporated, are substantially embraced in the Revised Statutes, between sections 2478 and 2491, inclusive. The material questions to be determined in this case arise under sections 2480, 2482, 2485 and 2486, the last two sections having been passed since the incorporation of the company. Section 2480 provides that if gas companies, when required by the council to lay pipes and light streets, alleys, public grounds or buildings, refuse or neglect, for six months after being notified by the authority of the council, to comply with such requirement, the council may lay pipes and erect gas-works for lighting such streets, alleys or public grounds, and all other streets, alleys and public grounds not already lighted; and such companies shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings not already furnished with gas-pipes

of such companies. Section 2482 provides that a neglect to furnish gas to the citizens and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed and established by the council from time to time, shall forfeit all rights of such company under the charter by which it was established; and the council may proceed to erect or by ordinance empower any person to erect, gas-works for the supply of gas to such corporation and its citizens. Section 2485 makes it unlawful for any council to agree by ordinance, contract or otherwise with any person or persons, for the construction or extension of gas-works for manufacturing or supplying the corporation or its inhabitants with gas, which shall give or continue to any person or persons making such agreements with the council the exclusive privilege of using the streets, lanes, commons or alleys, for the purpose of conveying gas to the corporation, or the citizens thereof; nor is the council permitted to make any such agreement which shall not secure to the council the right to purchase such works, and all the appurtenances belonging thereto, at any time within the existence of such contract or agreement. Section 2486 enacts that "the council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase any gas-works already erected therein." This provision for the erection of gas-works by the city was first embodied in section 423 of the Municipal Code, passed May 6, 1869, which, while a codification, enlarged the powers of municipalities as to gas-works and lighting corporations, and the same enlarged powers are continued under the Revised Statutes without material change. Among the general powers granted to cities, they may light streets, alleys, public grounds and buildings within the corporation, and provide for laying down gas-pipes; they may appropriate, enter upon and hold real estate within the corporate limits, for gas-works, and lighting and any public use; and may levy taxes for the special purpose of erecting, enlarging and improving gas-works, and for lighting the corporation.

It is urged in behalf of the Hamilton Gas-light Company that the legislature has declared, in sections 2480 and 2482, certain conditions under which the council may build gas-works, and that, in the absence of those conditions, the city has not such power

while there are gas-works in the municipality that have complied with all the provisions of the law, and met all the demands made upon them. Such an expression of the legislature will, it is said, exclude the right of a city to erect gas-works under any other circumstances. Those two sections designate what refusal or neglect on the part of gas companies to meet the requirements of the law would work a forfeiture of their rights under their charter, and authorize the council to lay pipes, and erect gas-works, and exclude a gas company already in operation from occupying any streets not already furnished with gas-pipes of such companies; but such authority is very different from the general power conferred upon the council by section 2486 to construct gas-works, without reference to the manner in which an existing company may use its franchise. Section 2486, in plain language, gives the power to the council either to erect gas-works, or to purchase such works already erected. The authority granted is not coupled with any condition or contingency, but is to be exercised when the council may deem it expedient and for the public good. The language is free from ambiguity. The discretionary power would hardly seem consistent with the limitation sought to be imposed, that the council can build gas-works only where there are no gas-works in the municipality, or where gas companies already organized refuse or neglect to comply with the requirements of the law as to lighting or laying pipes, or neglect to furnish gas to citizens. The interest of the city may demand that a gas company established and doing business, although complying with all statutes and ordinances, should not continue to enjoy exclusive possession of the field of operation; and it may be deemed expedient, and for the public good, to discourage the growth of a monopoly, by the city's erecting its own gas-works, or encouraging the incorporation of a competing company. Certainly it would not be a doubtful public policy to place the city on an independent basis, by clothing it with the power of building its own gas-works if an emergency should arise, although there might be a company within the municipality which fully discharged all its corporate duties. Indeed, the provision in section 2485, rendering it unlawful to give or continue to any gas company the exclusive privilege of using the streets, would seem designed not merely to prevent the sole occupation of the streets by one company as

against another, but also to secure to the municipality the use of the streets, should it conclude to avail itself of the right, granted by the following section, of erecting gas-works.

It is conceded that a municipality within which a gas company has been already formed may, by a vote of its citizens and by ordinance, authorize the operation of another gas company within its borders. R. S., § 3551. The municipality may also purchase the gas-works of the newly-organized company. But it is contended that if two such companies exist at the same time, in the same municipality, and occupying the same territory, the municipal authorities, though purchasing, could not operate the works of one in opposition to the other; that after such purchase the law will not permit the city to use its own property for the purpose of lighting its streets for the public safety and convenience, unless it either buys out the other company, or the other company goes out of existence, or fails to discharge its statutory duty. The statute, it is evident, is not susceptible of such an interpretation; nor has the legislature, in our judgment, hampered by such limitations and conditions the right of a city to purchase and operate the works of one of two competing gas companies within its borders. And, if it may own and use without restriction the plant of one such company, it may well be inquired, why may not the city, so far as the other company is concerned, be authorized to erect its own gas-works whenever it may be deemed expedient and for the public good? In its present form, section 2486 was passed many years after the two sections which are reproduced in section 2480 and section 2482. Between the earlier and later statutory provisions we discover no repugnancy, and the canons of statutory construction do not require that either should prevail over the other. The authority given to municipalities by the later section is distinct from and independent of the power granted by the two antecedent sections. But, if such repugnancy did exist in the present case, it is one of the settled rules of construction that when, in a statute, there are several clauses which present, as compared with each other, an irreconcilable conflict, the one last in order of date or local position must prevail, whether the conflicting clauses be sections of the same act, or merely portions of the same section. This rule, it has been said, is subject to the modification that a later clause, which is obscure and inco-

herent, will not prevail over an earlier one, which is clear and explicit. *End. Interp. St.*, § 183. But the provisions of section 2486 are plain and unequivocal, and of definite import. Where the legislature has used words of a plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that a legislature did not mean what it has expressed. The fittest course, in all cases where the intention of the legislature is brought into question, is to adhere to the words of the statute, construing them according to their natural import, in the order in which they stand in the act. *Dwar. St.* 583; *Rex v. Ramsgate*, 6 *Barn. & C.* 712.

2. It is urged in behalf of the plaintiff that the Hamilton Gas-light Company acquired, by its charter, a vested right to supply the public, as well as private consumers, with gas at such reasonable prices as the council should fix, and that to authorize the city to construct and operate its own gas-works would be to destroy that vested right without due process of law. It may be conceded that the company acquired the right of laying its pipes and conveying gas to the city and its citizens; but it never acquired the exclusive franchise of opening and using the streets of the city for the introduction of pipes and other apparatus for the purpose of thus conveying gas. By section 53 of the act of May 1, 1852, under which the company was organized, it was provided as follows: "Any corporations formed under this act shall have full power, if a gas company, to manufacture and sell and to furnish such quantities of gas * * * as may be required in the city, town or village where located, for public and private buildings, or for other purposes; and such corporation shall have power to lay conductors, for conducting * * * gas through the streets, lands, alleys and squares in such city, town or village, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations as they may prescribe." But this section does not purport to grant, either directly or by the permission of the municipal authorities, an exclusive right to any one company to lay its conductors for conducting gas through the streets of a city, town or village. A gas company may open the streets and lay down its pipes with the consent of the city, under such reasonable regulations as the city may make; but the right to give such consent and prescribe

such regulations does not carry with it a power to exclude every other gas company, or to bar the municipality from ever using unoccupied portions of the streets for the same purposes. In *State v. Gas-light Co.*, 18 Ohio St. 262, 289, the principle is stated that to enable the city council to grant, by ordinance in the nature of a contract, an exclusive right to use the streets and alleys of the city for the purpose of laying down pipes for carrying gas to be used in lighting the city for a term of twenty-five years, the power must be shown to have been expressly granted, or to be so far necessary to the proper execution of the powers which are expressly granted as to make its existence free from doubt. Grants by the public are to be strictly construed, and an intention to grant an exclusive privilege or monopoly is not to be implied. Where exclusive privileges are not expressly given by the charter, they should not be held to be conferred. 2 Mor. Priv. Corp., § 1057; *Charles River Bridge v. Warren Bridge*, 11 Pet. 536, 549; *Tuckahoe Canal Co. v. Tuckahoe & J. R. Co.*, 11 Leigh, 42; *Shorter v. Smith*, 9 Ga. 517; *Gas Co. v. Parkersburg*, 30 W. Va. 435; 4 S. E. Rep'r, 650.

Again, by section 54 of the act of 1852, it is enacted: "The municipal authorities of any city, town or village, in which any gas-light * * * company shall be organized under this act, are hereby authorized to contract with any such corporation for the lighting * * * of the streets, lands, lanes, squares and public places in any such city, town or village." While the language of this section, properly construed, authorized the municipal authorities to contract with a gas company for lighting the streets and other public places, it is not, in the absence of express authority, to be construed as investing them, by implication, with power to grant by contract, to such company, the exclusive privilege in perpetuity of supplying gas for the public lighting. The city of Hamilton was not, either under the act of 1852, or under any law subsequently passed, bound to enter into an agreement with the gas company for supplying with gas the streets and other public places in the corporate limits. It did, however, make contracts with the company, from time to time, for that purpose — the last of which expired by its own limitation, on the 1st day of January, 1889. That the city performed all its contract obligations is not denied; and, if the city did not see fit to further contract, it

was beyond the power of the company to compel it to do so. Pursuant to its agreement, the city purchased gas from the company for over thirty years, and then determined to erect its own gas-works under the authority which had then been given by the statute. In this there was no destruction of a corporate franchise or vested right of the company. The company still retains the right to contract with the city for the public lighting, and to furnish gas for private consumption. Its pipes and mains remain undisturbed in the streets, and through them gas may be conducted, as long as the company will manufacture it. Indeed, there has been no interference by the city with any of the real or personal property of the company. It is conceded in argument by the gas company that if the city were to supply, for the public lighting, some newly-discovered or different agency than gas, such, for instance, as electricity, the company would have no reason to complain; and yet the investment of the company would be subject to no greater detriment or loss, if any, by the city's manufacturing its own gas, than by adopting electricity as a mode of public lighting.

There having been no exclusive franchise granted to the Hamilton Gas-light Company, either to open and use the streets for the introduction of gas-pipes and other apparatus, or to supply gas *in perpetuum*, under contract to the city of Hamilton for public consumption, and the city having complied with the terms of all written contracts entered into with the company from time to time, there was no interference with vested rights; nor does section 2486, when construed as authorizing the city to erect its own gas-works, become, as to the company, a law impairing the obligation of a contract. In *Turnpike Co. v. State*, 3 Wall. 210, the state of Maryland, in 1812, incorporated a company to build a turnpike road between Baltimore and Washington. By its charter, the company had power to take tolls, but, in regard to its privileges generally, there was nothing special about it. In 1831 the same state granted a charter to a railroad company to make a railroad between the same cities, the line of which ran near to and parallel with the track of the turnpike. The turnpike company set up in defense that the railroad had been made not only under the authority of the state, but to a considerable extent with the state's money; the state, in addition, managing it largely, and

getting from it one-fifth of the whole amount received for the transportation of passengers; that by incorporating a company to make a railroad, with the grant of a charter to the turnpike company in force, the state had impaired the obligation of a contract. But it was said by Justice Nelson, in delivering the opinion of the court: "The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defense, is that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms or by necessary implication, and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are not the subject of legal redress."

It is argued and claimed, in substance, that, as long as the city of Hamilton continues to light its streets, public grounds and buildings with gas, the Hamilton Gas-light Company, a corporation organized under a general law passed since the adoption of the present state constitution, will have, while it exists and complies with all statutes of Ohio and ordinances of the city relating to gas companies, the exclusive franchise or privilege, as against the city, of manufacturing and furnishing the gas required by the city for such public lighting; and that if the city is allowed, by virtue of the provisions of section 2486, to erect its own gas-works, such privilege will be destroyed. The privilege claimed involves the imposition of a burden upon all tax paying citizens in the municipality, for the purpose of giving a monopoly to a private corporation for an indefinite period. If, for the sake of the argument, the company ever acquired such a special privilege, it is evident that the statute empowering any city to erect its own gas-works as effectually revoked and repealed the privilege as if that had been the declared intent of the statute. By section 2, article 1, of the constitution of 1851, "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly;" and in connection with this section is to be construed section 2, article 13, which declares that "corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed." The

general law under which the Hamilton Gas-light Company was formed was subject to the limitations and reservations contained in these provisions of the constitution. The constitutional provisions entered into the general law, and operated as to all corporations organized under it, in the same manner as a reservation to the legislature embodied in a special charter. Such a reservation in a special charter, or under a general law, negatives an intention on the part of the legislature to confer irrevocable rights upon the corporators.

In *Shields v. State*, 26 Ohio St. 86, a consolidated company was formed by the union of several original and independent railroad companies, in pursuance of the act of April 10, 1856 (4 Curwen, R. S. 2791). Among the companies forming the consolidation were two companies chartered and organized before the adoption of the present constitution, and whose charters were, therefore, not subject to the constitutional provisions above quoted. It was held that the consolidated company was a corporation formed under a general law, within the meaning of section 2, article 13, of the constitution, and, as such, was subject to the limitations and reservations contained in that section, and in section 2, art. 1, of that instrument; and that the general assembly had power to pass the act of April 25, 1873 (70 Ohio Laws, 161), altering and regulating rates of fare chargeable by such consolidated company. The case was taken on error to the supreme court of the United States (see 95 U. S. 319), and the judgment of the state court was there affirmed. It was there held that the general assembly did not impair the obligation of a contract by prescribing the rates for the transportation of passengers by the new company, although one of the original companies was, prior to the adoption of the constitution of 1851, organized under a charter which imposed no limitation as to such rates. The constitutional provision that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly," entered, it was said, by the court, into the act under which the consolidation was made, and rendered the corporation created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the act; and the act of April 25, 1873, in the particular in question, was held to be a legitimate exercise of

the reserved power of alteration, and was, therefore, valid. The force of the doctrine announced in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, that the creation of a private corporation by charter is such a grant as includes an obligation of the nature of a contract which no state legislature can pass laws to impair, has been, in a large measure, obviated by the practice of reserving to the state the right to alter, revoke or repeal charters, general incorporation laws and special privileges and immunities. Whether such special privileges and immunities be designated property, or a capacity to acquire and hold property, a wise public policy suggests that they should not be irrevocably placed beyond the sovereign control of the state. The corporeal property of the Hamilton Gas-light Company, real and personal, has remained unimpaired; but the exclusive franchise claimed by the company, as against the city, would, if it had ever been acquired, be subject to the power vested by the constitution in the general assembly.

Demurrer to the answer overruled, and petition dismissed.

Spear, J., dissents.

In the dissenting opinion of Spear, J., which is too lengthy for insertion, he refers to authorities as follows: Effect must be given to every part of a statute and different parts must be so construed as to be consistent with each other. *State v. Blake*, 2 Ohio St. 147; *Allen v. Parish*, 8 Ohio, 187; *Pancoast v. Ruffin*, 1 Ohio, 381; *Hirn v. State*, 1 Ohio St. 15; *State v. Commissioners*, 20 Ohio St. 421. The statute gave to the company the exclusive right, so long as it complied with every requirement of the law, to supply gas to the city of Hamilton and its inhabitants. The act did not part with the police power of the legislature, and, therefore, was not in excess of its powers. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas-light Co.*, 115 U. S. 683. Under a power reserved to alter or repeal corporate charters, a corporation cannot be deprived of vested rights or property. *Hyatt v. McMahon*, 25 Barb. 457; *Shields v. Ohio*, 95 U. S. 325; *Sinking Fund Cases*, 99 U. S. 700; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Commissioners v. Water Power Co.*, 104 Mass. 446; *Parker v. Railroad Co.*, 109 Mass. 506. To destroy the value of the company's property is equivalent to a taking of it, which is prohibited by the state and federal constitutions. *Pumpelly v. Green Bay Co.*, 13 Wall. 166. A statute should not receive a construction which makes it conflict with the constitution, if a different construction is possible. *Burt v. Rattle*, 31 Ohio St. 116.

FARNUM ET AL. V. PHENIX INSURANCE COMPANY.

(23 Pac. R. 809; 83 Cal. 246.)

1. **INSURANCE. LIABILITY ON POLICY WHEN PREMIUM NOT PAID BEFORE LOSS.** Defendant, through its local agent, who was authorized to make contracts of insurance and countersign policies, insured the plaintiff on certain property for five years from May 1, 1887. The agent had authority to give a credit of sixty days for the payment of the premium, but he gave the plaintiffs until October 1. On September 5 the property insured was destroyed by fire and on September 30 the plaintiffs tendered the premium, which was refused. The policy contained a provision that the company would not be liable until the premium was actually paid, also that nothing should amount to a waiver of any condition therein except "a distinct, specific agreement, clearly expressed and indorsed on the policy." Held, that the delivery of the policy upon an agreement giving credit for the premium was a waiver of the condition as to pre-payment, and the policy was binding upon the company from its delivery.

2. **POWER OF AGENT. WAIVER.** The agent in question, having authority to countersign and deliver policies of insurance, and thereby complete the contract, and, also, to give a credit for the payment of the premium, was clothed with apparent authority to represent the company, and the company was bound by the agreement as made.

3. **EFFECT OF RESTRICTIONS IN POLICY AS TO WAIVER.** The provision in the policy requiring a waiver to be indorsed on the policy can have no operation until the policy is delivered, and, consequently, does not affect a waiver made previous to the issuing of the policy.

4. An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, that it cannot, by its agents, make an oral contract, or an oral waiver, not forbidden by the statute of frauds.

5. **CANCELLATION OF POLICY.** Acting under instructions from the general agents for the state, the local agent mailed a notice to the plaintiffs on the last of June, to the effect that the premium must be paid by July 1, or the policy would be canceled. This letter was not received by the plaintiffs. Afterward the policy was canceled on the books of the company. Held, that the policy could only be canceled by personal notice to the plaintiffs, and that what had been done toward canceling the policy was ineffectual.

6. **WAIVER OF PROVISION FOR ARBITRATION.** The policy provided that no suit should be brought on the policy until after an award had been made fixing the amount of the claim. The plaintiffs submitted proofs of loss, to which the defendant replied denying all liability. Held, that the action of the company was a waiver of the provision, and that an offer of the plaintiffs to arbitrate would have been an idle act.

Louttit, Woods & Levinsky for appellants *J. C. Campbell* and *P. W. Bennett* for respondent.

VANCLIEF, C. The action is upon a policy of insurance, and

the appeal is from a judgment of nonsuit. The grounds of defendant's motion for nonsuit, and upon which the motion was granted, are presented by a bill of exceptions, and the record discloses the following facts: The defendant is a foreign fire insurance corporation doing business as such in this state, having general agents for the state, located in San Francisco, and a duly-appointed local agent for the county of San Joaquin, located at Stockton. On May 2, 1887, plaintiffs verbally applied to the Stockton agent for a policy of insurance upon their frame barn, wind-mill, tank, and tank-house, situated about two miles southeast of Banta, in San Joaquin county. The land upon which these buildings stood was the property of G. W. Trahern, the father of one of the plaintiffs, who had permitted plaintiffs to erect the buildings thereon, but the buildings were the property of plaintiffs, who resided upon the land, and used and occupied the buildings. At the time the insurance was applied for the local agent was informed that the land belonged to Trahern. The policy, as applied for, was issued insuring the buildings for the term of five years from May 1, 1887, the insurance on the barn being for \$1,000, and upon the other structures for \$200. The policy does not refer to the ownership of the land on which the buildings stood. On September 5, 1887, the barn was totally destroyed by fire, and it was admitted that when destroyed it was of the value of \$1,000. Notice and proof of the loss were duly given and made by plaintiffs, upon receipt of which the defendant, without questioning the amount of the loss, denied all liability on the policy. No offer or request was made by either party to submit the question, as to amount of the loss, to arbitration. At the time of the fire and loss no part of the premium had been actually paid, but it was in evidence that the local agent of the defendant, at the time the policy was issued and delivered, verbally agreed and promised to give the plaintiffs a credit on the premium until October 1, 1887, and that the policy was taken by plaintiffs with that understanding, and upon that condition, though the agreement for such credit was not indorsed in writing upon the policy. The policy was countersigned by the local agent, and delivered to plaintiffs, on May 24, 1887. It was admitted that it was the custom of defendant to allow its agents to give credit for premiums for the term of sixty days; and it was proved that the

local agent was, by virtue of his appointment, made responsible for the collection of all premiums on policies issued by him. On June 25, 1887, the local agent mailed to plaintiffs, at Banta, a written notice stating that "the premium on policy No. 73143, on barn, tank, etc., \$1,200, amounting to \$73.50 on five years' policy, falls due on the 1st of July, and our instructions from the home office are imperative to collect in sixty days;" and inclosed in the same envelope was a notice that, "unless the premium thereon shall be paid on or before twelve o'clock noon of July 1, 1887, we shall cancel the insurance under said policy on our books for non-payment of premium, without further notice, and terminate our liability thereunder from that date." It was proved that there was a regular daily communication by mail between Stockton and Banta; but neither of the plaintiffs actually received said notice. At the expiration of the time named in the notice, the premium being still unpaid, the general agents of defendant at San Francisco made an entry in the books in their office to the effect that the policy was canceled, but no notice of the cancellation was given to either of the plaintiffs. On September 30, 1887, plaintiffs tendered to the local agent of defendant the full amount of the premium, which he refused to receive. The pleadings admit that the amount of the premium was thereupon immediately deposited by plaintiffs, subject to the order of defendant, and that defendant was notified in writing of such deposit, and payment of the amount to defendant is offered in the complaint. The policy recites a consideration of \$73.50, but does not expressly acknowledge receipt of payment. It contains the usual conditions of fire policies as to the use and occupancy of the premises. The following clauses are the only ones relevant to the points to be considered: "The company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid." "The use of general terms, or any thing less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." "The insurance may be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." "The amount of solid value and of damage to the property * * * may be

determined by mutual agreement between the company and the assured, or failing to agree, the same shall be submitted to competent and impartial arbitrators. * * * It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable by any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided. In witness whereof the Phenix Insurance Company has caused these presents to be signed by its president, and attested by its secretary, in the city of Brooklyn, county of Kings, N. Y.; but the same shall not be binding until countersigned by Henry C. Keyes, agent for the company at Stockton. Stephen Crowell, President; Philander Shaw, Secretary. Countersigned at Stockton this 24th day of May, 1887. Henry C. Keyes, Agent."

1. The defendant contends that there is no liability upon the policy, because the premium was not actually paid before the loss, and because the agreement for credit was not indorsed in writing upon the policy. It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid, is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium; and that in such case the company is liable for a loss which may occur during the period of the credit. *Boehen v. Insurance Co.*, 35 N. Y. 131; *Wood v. Insurance Co.*, 32 N. Y. 619; *Goit v. Insurance Co.*, 25 Barb. 190; *Trustees v. Insurance Co.*, 18 Barb. 69; *Sheldon v. Insurance Co.*, 26 N. Y. 460; *Bodine v. Insurance Co.*, 51 N. Y. 117; *Bowman v. Insurance Co.*, 59 N. Y. 521; *Church v. Insurance Co.*, 66 N. Y. 222; *Manufacturing Co. v. Insurance Co.*, 66 N. Y. 613; *Latiox v. Insurance Co.*, 27 La. Ann. 113; *Pino v. Insurance Co.*, 19 La. Ann. 233; *Insurance Co. v. Neyland*, 9 Bush, 430; *Heaton v. Insurance Co.*, 7 R. I. 506; *Eagan v. Insurance Co.*, 10 W. Va. 583; *Hodge v. Insurance Co.*, 33 Hun, 584; *O'Brien v. Insurance Co.*, 22 Fed. Rep'r, 586; *Tennant v. Insurance Co.*, 31 Fed. Rep'r, 322; *Insurance Co. v. Norton*, 96 U. S. 234; *Young v. Insurance Co.*, 45 Iowa, 378; *Wagon Co. v. In-*

insurance Co., 20 Fed. Rep'r, 232; *Post v. Insurance Co.*, 43 Barb. 351; *Van Schoick v. Insurance Co.*, 68 N. Y. 440. The reason for this rule is well expressed in the case last above cited, as follows: "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium, as a necessary precedent to delivery, was too plainly in contradiction with the condition for pre-payment for it to be supposed that it was meant by the insurer, or supposed by either party, that it was intended to make that condition a potent part of the contract. * * * It would be imputing a fraudulent intent to the defendants in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe." In *Insurance Co. v. McCrea*, 8 Lea, 520, it was said: "It seems to be well settled that, when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition or its breach will be considered as waived, because otherwise it would be an unmeaning form, the only effect of which would be to deceive and defraud."

In *Tennant v. Insurance Co.*, *supra*, Ross, J., holds that an extension of credit for an insurance premium pursuant to custom, by an agent having power to countersign a renewal receipt upon a life-policy, made the renewal of the policy binding in favor of the assured, notwithstanding the terms of the policy making the actual payment of the premium a condition precedent to the binding force of the renewal, and notwithstanding the death of the insured before the payment of the premium, and assigns as the reason for so holding that "it would manifestly operate as a fraud upon him to hold that the insurance did not become operative until the premium was actually paid." It should also be remarked that it would be manifestly unjust for an insurance company, which extends the time for the payment of the premium upon an executed and delivered policy, to charge the full amount of premium upon the risk for the entire period covered by the policy, and to accept such full amount at the expiration of that

period if no loss occurred meanwhile, and yet to deny the validity of the policy, and its liability upon it during the period of credit, in case a loss should occur during that period.

In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least sixty days. He represented the full power of the company to make a consummated and binding contract of insurance by countersigning and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. "An insurance agent, clothed with authority to make contracts of insurance or to issue policies, stands in the stead of the company to the assured." *Rivara v. Insurance Co.*, 62 Miss. 728. In *Insurance Co. v. Block*, 109 Penn. St. 538, it was held that the counter-signature of an authorized agent upon a policy which is unconditionally delivered by him to the insured, and which, by its terms, requires such countersigning to make it valid, is a virtual acknowledgment of the receipt of premium, and estops the company to deny the validity of the policy, upon the ground that the premium was not actually received by the officers of the company. The policy in this case does not formally express receipt of premium, but it recites a consideration of \$73.50 for the contract of insurance, and declares that the policy shall not be binding until countersigned by the agent at Stockton, and thus impliedly authorizes him to consummate a binding contract of insurance for the consideration expressed. If the policy had contained a formal receipt of premium, its unconditional delivery would have been conclusive evidence of payment, so as to have estopped the defendant from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid (*Civil Code*, § 2598; *Basch v. Insurance Co.*, 35 N. J. Law, 429; *Insurance Co. v. Fennell*, 49 Ill. 180); and upon principle the same result should follow where the policy is delivered as a valid and completed contract, upon a consideration expressed therein, the receipt of which is impliedly acknowledged, an authorized credit having been agreed

upon as an equivalent and substitute for cash payment. The promise to pay the premium at a future time was a sufficient consideration for the contract to insure, as there can be no question that the promise to pay at a future day was binding on the plaintiffs, and could have been enforced by the defendant.

It is no answer to this to say that the Stockton agent was not authorized to give so long a credit as that given in this case — from May 2 to October 1, 1887 — but was limited to a credit of sixty days; for it is sufficient that he had authority to give a credit of sixty days. The credit given was a valid credit for sixty days, at least, and the giving of any credit by authority of the company was a waiver of actual payment as a condition precedent to the liability of the company. The only remedy of the company thereafter was to rescind or to cancel the policy for non-payment of the premium within the sixty days, upon personal notice to the plaintiffs, which the bill of exceptions shows was not received by either of the plaintiffs. When credit is given by an insurance company it has no right to cancel the policy for non-payment of premium, except after putting the insured in default (*Latiox v. Insurance Co.*, 27 La. Ann. 113), and personal notice of intended cancellation must be given to the insured (*Insurance Co. v. Turnbull*, 86 Ky. 230; 5 S. W. Rep'r, 545).

If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective. *Mullen v. Insurance Co.*, 121 Mass. 171. Notice of cancellation to the agent who negotiated the policy will not bind the assured (*Grace v. Insurance Co.*, 109 U. S. 278; 3 Sup. Ct. Rep'r, 207; *Assurance Society v. Insurance Co.*, 84 Va. 116; 4 S. E. Rep'r, 178; *Insurance Co. v. Turnbull*, 5 S. W. Rep'r, 542), nor to any other person than the one obligated to pay the premium (*Chadbourne v. Insurance Co.*, 31 Fed. Rep'r, 533).

Again, the local agent at Stockton, being clothed with general power to receive proposals for insurance and to countersign and deliver policies in San Joaquin county, is presumed to have the power of the company within that county to waive the immediate payment of premiums, and to make contracts for credit. *Wagon Co. v. Insurance Co.*, 20 Fed. Rep'r, 232; *Post v. Insurance Co.*, 43 Barb. 351. Whether an agent has general or only particular powers is not determined by simply calling him a local agent.

Murphy v. Insurance Co., 3 Baxt. 448. An agent who, under general instructions from the home office, has authority, within a certain territory, to deliver policies and receive premiums, is a general agent, and has authority to waive cash payment. *Insurance Co. v. Booker*, 9 Heisk. 606. A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals. *Baubie v. Insurance Co.*, 2 Dill. 156. Where, by the terms of a policy, a particular local agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency, who has no notice of limitation of his power, though he may have exceeded his authority, and violated his duty to his principal. *Insurance Co. v. Earle*, 33 Mich. 151, 153; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Whited v. Insurance Co.*, 76 N. Y. 415.

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. *Insurance Co. v. Wilkinson*, 13 Wall. 234; *Insurance Co. v. Neyland*, 9 Bush, 436; *Rivara v. Insurance Co.*, 62 Miss. 721; *Insurance Co. v. McLanathan*, 11 Kans. 533; *Insurance Co. v. Kasey*, 25 Gratt. 271; *Wheaton v. Insurance Co.*, 76 Cal. 415; 18 Pac. Rep'r, 758; *Insurance Co. v. Barnes (Kans.)*, 21 Pac. Rep'r, 165; *Insurance Co. v. Hogue*, 21 Pac. Rep'r, 641. By the authorities above cited it appears that the plaintiffs were entitled to the whole term of the credit for which they contracted, through the defendant's local agent, and could not thereafter be put in default for a failure to pay or tender the premium before the expiration of the period of credit actually given. That credit from May 2 until October 1, 1887, was actually given, must be assumed as a fact for the purposes of the motion for a nonsuit, it appearing from the bill of exceptions that evidence to that effect was given on behalf of the plaintiffs without any counter-evidence whatever, unless the contents of the letter addressed to the plaintiffs by the defendant's agent at Stockton may be so construed.

That letter only purports to notify them that "instructions from the home office are imperative to collect in sixty days," and that the premium "falls due on the 1st of July" — two months after the policy was delivered — thus clearly indicating that a credit of sixty days had been given with the sanction of the company; but, as the letter was not received by the plaintiffs, it can have no effect as evidence against them for any purpose. It also appears by the terms of the written appointment of the local agent that he was made responsible to the company for the collection of all premiums on policies issued by him, and that it was the custom of the company to allow its agents to give a credit of sixty days on premiums. From these facts it may fairly be inferred that the company was content to substitute the personal liability of the agent for the condition of pre-payment of the premium. *Elkins v. Insurance Co.*, 113 Penn. St. 386-394; 6 Atl. Rep'r, 224; *Insurance Co. v. Hoover*, 113 Penn. St. 591; 8 Atl. Rep'r, 163; *Insurance Co. v. Elkins*, 124 Penn. St. 484; 17 Atl. Rep'r, 24.

It is urged by respondent's counsel that actual payment of the premium is a condition precedent to a recovery upon the policy, notwithstanding an agreement for credit, and that it was so decided in *Bergson v. Insurance Co.*, 38 Cal. 546. But it appeared in that case that issue was taken on the fact of payment, and that there never was any actual payment or tender of the whole premium, and that the policy was canceled for non-payment of a part of the premium, within the period of the credit given by the company, and after due notice. The case also holds that an acknowledgment of the receipt of the premium in a delivered policy may be contradicted so as to defeat a recovery upon the policy; but this rule has been changed by section 2598 of the Civil Code. The decision in that case is no authority against the position that a tender of payment of the premium in full, within the term of the credit allowed, is a sufficient compliance with the condition of payment to sustain an action on the policy. The company cannot refuse such a tender, and then successfully insist upon a nonsuit, because the premium was not actually paid. *Eagan v. Insurance Co.*, 10 W. Va. 588; *Boehen v. Insurance Co.*, 35 N. Y. 132; *Bodine v. Insurance Co.*, 51 N. Y. 119; Civil Code, § 1485.

2. The next important question relates to the effect of the pro-

vision in the policy that "the use of general terms, or any thing less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." So far as such provision has been held to constitute a limitation upon the power of agents, it has been applied to cases of waiver of conditions made after the signing and delivery of the policy as a consummated contract, such as the waiver of conditions relating to assignment of the policy, to increase of risk, or to occupancy of the insured premises. *Shuggart v. Insurance Co.*, 55 Cal. 408; *Glad- ding v. Association*, 66 Cal. 6; 4 Pac. Rep'r, 764; *Enos v. Insurance Co.*, 67 Cal. 62; 18 Pac. Rep'r, 379; *Walsh v. Insurance Co.*, 73 N. Y. 5. In the last case cited, it is expressly held that the conclusion that such a provision limits the power of agents after the policy has been delivered, and the restriction upon their power to waive conditions as to the use or vacancy of the premises known to the insured, "does not interfere with that class of cases which have established that conditions for pre-payment of premiums and the like, which enter into the validity of the contract of insurance at its inception, may be waived by agents, and are waived, if so intended."

It has been expressly adjudged by the supreme court of Iowa, in a well-considered case, that the insured is not bound to take notice of the conditions in the policy that the premium must be actually paid, nor of the provision that the waiver of condition must be indorsed in writing on the policy when the policy is executed and delivered to him as a valid and completed contract, by an agent having authority to countersign it, and who before or at the time of the delivery of it has given the insured a credit upon the premium by parol; and that, if a loss occurs in such case before the credit expires, the company is bound, notwithstanding that the agreement for credit was not indorsed upon the policy. *Young v. Insurance Co.*, 45 Iowa, 378. And it has been repeatedly held that where any fact, which would constitute a breach of a condition precedent to any liability of the company on the policy, is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy, as a valid and

completed contract, is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers or conditions expressed in the policy shall be in writing indorsed on the policy. *Van Schoick v. Insurance Co.*, 68 N. Y. 434; *Whited v. Insurance Co.*, 76 N. Y. 418-421; *Insurance Co. v. McCrea*, 8 Lea, 513-520; *Insurance Co. v. Jones*, 62 Ill. 458; *Insurance Co. v. Earle*, 33 Mich. 151-153; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Geib v. Insurance Co.*, 1 Dill. 449; *Devine v. Insurance Co.*, 32 Wis. 471; *Pelkington v. Insurance Co.*, 55 Mo. 172; *Insurance Co. v. Lyons*, 38 Tex. 253; *Insurance Co. v. Hall*, 12 Mich. 202; *Carroll v. Insurance Co.*, 38 Barb. 402; *Manufacturing Co. v. Insurance Co.*, 2 Paine, 501; *Insurance Co. v. Schettler*, 38 Ill. 176. It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver not forbidden by the statute of frauds. *Trustees v. Insurance Co.*, 19 N. Y. 305; *Insurance Co. v. Norton*, 96 U. S. 234; *Carrugi v. Insurance Co.*, 40 Ga. 141; *Lamberton v. Insurance Co.*, 39 Minn. 129; 39 N. W. Rep'r, 76; *Insurance Co. v. Earle*, 33 Mich. 153; *Reiner v. Insurance Co.*, 42 N. W. Rep'r, 208; *Steen v. Insurance Co.*, 89 N. Y. 326. Whether or not any particular agent has the general power of the company to make an oral contract, or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact. *Insurance Co. v. Norton*, 96 U. S. 234; *Steen v. Insurance Co.*, 89 N. Y. 326.

The authorities before cited show that a local agent, who is clothed with general power to solicit and consummate contracts of insurance within a certain territory, stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard

to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the "home office," in the state of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such a local agent to bind the company by waiver of any condition precedent to its liability, and to dispense with the requirement that such waiver shall be in writing indorsed on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it. *Geib v. Insurance Co.*, 1 Dill. 449; *Insurance Co. v. Earle*, 33 Mich. 151-153; *Whited v. Insurance Co.*, 70 N. Y. 418; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Insurance Co. v. McCrea*, 8 Lea, 513-520.

3. It is contended by counsel for respondent that the judgment of nonsuit should be sustained because the plaintiffs did not demand nor obtain an award of arbitrators as to the amount of loss. This, it is said, was a condition precedent to a right to maintain this action. No arbitration is contemplated or required by the terms of the policy, except in case of a failure of the parties to agree upon the amount of the loss. After the fire, and within the time prescribed by the policy, the plaintiffs furnished to defendant the requisite proofs of loss to the extent of \$1,000, the amount alleged in the complaint — and thereupon, without questioning or making any objection to the amount of the loss claimed or to the proofs thereof, the company, for other reasons, not only denied its liability, but denied the existence of the policy, claiming that it had been canceled two months before the loss. This was sufficient evidence that the defendant acquiesced in the amount of the loss claimed, and thereby waived its right to have it determined by arbitration. *Lasher v. Insurance Co.*, 18 Hun, 98; 55 How. Pr. 318; *Insurance Co. v. Putnam*, 20 Neb. 321; 30 N. W. Rep'r, 246; *Mentz v. Insurance Co.*, 79 Penn. St. 478; *Insurance Co. v. Badger*, 53 Wis. 284; 10 N. W. Rep'r, 504; *Wallace v. Insurance Co.*, 4 McCrary, 123; 41 Fed. Rep'r, 742; *Nurney v. Insurance Co.*, 30 N. W. Rep'r, 350. Then, it is well settled by a long line of authorities that the denial of all liability upon other grounds is a waiver even of the condition requiring

proofs of loss. *Insurance Co. v. Ruckman*, 127 Ill. 364; 20 N. E. Rep'r, 77; *Insurance Co. v. Spiers*, 8 S. W. Rep'r, 453; *Transportation Co. v. Insurance Co.*, 34 Conn. 561; *McBride v. Insurance Co.*, 30 Wis. 562; *Donahue v. Insurance Co.*, 56 Vt. 382; *Insurance Co. v. Erb*, 112 Penn. St. 149; 4 Atl. Rep'r, 8; *Zielke v. Assurance Corp.*, 64 Wis. 442; 25 N. W. Rep'r, 436; *O'Brien v. Insurance Co.*, 52 Mich. 131; 17 N. W. Rep'r, 726; *Wagon Co. v. Insurance Co.*, 20 Fed. Rep'r, 232; *Carroll v. Insurance Co.*, 72 Cal. 297; 13 Pac. Rep'r, 863. Under the circumstances, an offer by the plaintiffs to arbitrate would have been an idle act, which "the law neither does nor requires." Civil Code, § 3532.

None of the California cases cited to this point by respondent's counsel are opposed to the position here assumed. In *Old Saucelito L. & D. D. Co. v. Commercial Co.*, 66 Cal. 253, there was an actual dispute as to the amount of the loss, and plaintiff alleged that it had offered to submit to arbitration; but the court found to the contrary. 5 Pac. Rep'r, 232. So, in the case of *Adams v. Insurance Co.*, 70 Cal. 198; 11 Pac. Rep'r, 627, it appears that the only dispute between the parties was an express dispute as to the amount of the loss. In *Carroll v. Insurance Co.*, 72 Cal. 297; 13 Pac. Rep'r, 863, the difference as to the amount of loss had been submitted to arbitration, and an award had been made. The defendant pleaded this award as a limitation upon the amount to be recovered, and the plea was held good. As it appears from the bill of exceptions that the evidence on the part of the plaintiffs, substantially, and even strongly, tended to prove all the facts necessary to entitle the plaintiffs to recover, I think the judgment of nonsuit was erroneous, and should be reversed, and that the cause should be remanded for a new trial.

We concur, Belcher, C. C.; Hayne, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit is reversed, and the cause remanded for a new trial.

Insurance — waiving pre-payment of the premium. — In *Wilkins v. State Ins. Co. (Minn.)*, 45 N. W. Rep'r, 1, the agent of the defendant company, whose general duties were to solicit insurance, fill in policies already signed by the

general officers of the company, countersign and deliver the same, and collect and remit the premium, waived immediate payment by the plaintiff and delivered to him the policy sued on. The policy contained a provision that no insurance should be considered binding until actual payment of the premium. Also, that no part of the contract could be waived except in writing signed by the secretary of the company. It was held that the policy was notice to the plaintiff that the agent had no power to make the waiver, and that, by accepting the policy, he was estopped from setting up powers in the agent in opposition to the express limitations contained in the policy.

In *Whiting v. Mississippi Valley Mut. Ins. Co.* (Wis.), 45 N. W. Rep'r, 672, the question whether pre-payment of the premium had been waived was submitted to the jury on a question of fact under peculiar circumstances.

Restrictions in a policy upon the power of an agent to waive its conditions, can have no application to a waiver made before the policy is issued. *Crouse v. Hartford Fire Ins. Co.*, 1 Am. R. R. & Corp. Rep. 408; *Home Ins. Co. v. Stone River National Bank*, 1 Am. R. R. & Corp. Rep. 658.

CITY OF HOUSTON V. JANKOUSKIE.

(13 S. W. R. 269; 76 Tex. 368.)

1. MUNICIPAL BONDS. LIMITATIONS. NEW PROMISE. In a suit upon municipal bonds which are *prima facie* barred by the statute, a new promise cannot be implied from the fact that the secretary, in reports to the council made within the statutory period, included the bonds in a list of liabilities, nor from the further fact that the city had levied and collected taxes to meet interest due and create a sinking fund for the redemption of bonds theretofore issued, but without specifying any particular bonds.

2. NEW PROMISE. The new promise, to be effectual, must be made by the creditor to his debtor or to some one representing him.

H. F. Ring for appellant. *J. W. Walker* for appellee.

STAYTON, C. J. Appellee brought this action against appellant to recover a sum claimed to be due on bonds issued by the latter which matured on November 1, 1879. The action was not brought until November 23, 1888, and defendant pleaded in bar the statutes of limitation. For the purpose of avoiding the bar of the statutes of limitation, the plaintiff introduced in evidence the annual statements of the secretary of the city of Houston for the year 1885, in which the following item appears under the head of liabilities: "M. Reichman, past-due bonds, \$2,600.00." It was admitted that the bonds on which suit was brought were

a portion of the \$2,600 worth of bonds described in the annual statement as "M. Reichman, past-due bonds." Plaintiff also introduced the ordinance prescribing the taxes and licenses to be assessed and collected by the city of Houston for the year 1881, and each year thereafter; and it was admitted that the taxes collected by virtue of this ordinance were applied for the purposes mentioned in the same, including the payment of the city debt. The ordinance referred to levied a tax of one per cent annually on property within the city limits, which, "when collected, shall constitute a fund to be set apart and held for the payment of the interest on the various issues of city bonds heretofore issued under and by virtue of the ordinances and resolutions of this and former city councils, in the order as may be lawfully determined, and also for the creation of a sinking fund for the redemption of the said bonds." The court below held that these facts took the claim out of the bar of the statute, and entered judgment for principal and interest as they appeared from the bonds. It is claimed that this was error.

In an amended petition filed on April 24, 1889, it was averred "that all of said bonds have been recognized, and the justice of the same has been acknowledged in writing, and signed by the proper and legal officers of the said defendant, within the last four years." If it be conceded that this action is based on a new promise, or acknowledgment from which a promise may be implied, do the facts proved constitute such acknowledgment or promise? The full entry in the annual statement made by the secretary, having any bearing on the question before us, is, under the heading, "Bonded Debt:" "* * * M. Reichman, past-due bonds, \$2,600.00," and, under the heading, "Approximate Estimate of Accrued Interest on Bonds:" "* * * On \$2,600.00 Reichman bonds, six years, at ten per cent, \$1,560.00." This statement was no doubt made for the information of the city council, but there is no evidence that the secretary had any authority to make any acknowledgment or promise that would bind the city; nor is there any evidence that the city council approved it, or in any way acknowledged the existence of the debt. The declaration of the secretary, at most, shows that, in his opinion, bonds issued to M. Reichman for \$2,600 were past due, and that interest on them to time report was made amounted to

\$1,560; but the city cannot be bound by his opinions, even if expressed to the creditor, and, when only contained in report to city council, they are wanting in all the elements necessary to an acknowledgment or promise by which the city can be bound. An acknowledgment from which a promise is to be implied must be made by the debtor in writing, or by some person authorized to make it; and it must be made to the person holding the claim, or to some person acting for him. No acknowledgment of a debt not made to some person will interrupt the running of the statute, and a statement made by an agent to his principal cannot operate as an acknowledgment. It has been held that the acknowledgments in writing signed by the debtor, but never delivered to the creditor, or to any one for him, cannot interrupt the running of the statute, or remove the bar completed by lapse of time. *Allen v. Collier*, 70 Mo. 138; *Merriam v. Leonard*, 6 Cush. 153. A promise or acknowledgment made by a stranger is not sufficient. *Fort Scott v. Hickman*, 112 U. S. 150; 5 Sup. Ct. Rep'r, 56; *McKinney v. Snyder*, 78 Penn. St. 497; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Kirby v. Mills*, 78 N. C. 124; *Parker v. Shuford*, 76 N. C. 219; *Carroll v. Forsyth*, 69 Ill. 127; *Wachter v. Albee*, 80 Ill. 47; *Ringo v. Brooks*, 26 Ark. 543. In *Fort Scott v. Hickman* it appeared that a committee of a city council appointed to consider the city indebtedness made a report showing the assets and liabilities of the city, which included as a liability a named issue of bonds. The report proposed a plan for compromise with holders of city bonds, proposition to holders to be made through circular which the committee recommended, which was to be sent to persons holding city bonds other than the named issue, as to which the committee made no report, further than to include them in statement of liabilities. The city council adopted the report of committee, and ordered the circular to be sent to holders of bonds other than the issue named, which was done. On this state of facts, it was held that neither the report of committee, its adoption, nor the circular letter, was such acknowledgment of the debt evidenced by the named issue of bonds as to take them out of the bar of the statutes of limitation. Acknowledgment of a debt such as will justify the raising of an implied promise to pay it certainly ought to be made to the other party to the contract, or to some person representing him. The

mere fact that the city levied and collected taxes to meet interest due, and create a sinking fund, cannot operate as an acknowledgment of or promise to pay any particular bond or issue of bonds. No fact is shown by the evidence which defeats the bar of the statute pleaded; and, as the cause was tried without a jury, the judgment will be reversed, and here rendered in favor of appellant.

It is so ordered.

BURKHAM V. OHIO & MISSISSIPPI RY. CO. ET AL.

(23 N. E. R. 799; 122 Ind. 344.)

1. RAILROAD IN STREET. DAMAGES. ESTOPPEL. An abutting owner who consents to the use of the street by a railroad company cannot afterward enjoin the use of the street or recover damages therefor.

2. LIABILITY OF MUNICIPALITY. A municipal corporation, which grants permission to use a street for railroad purposes, is not, on that account, liable to the abutting owner for damages.

3. LIABILITY OF THE RAILROAD COMPANY. In such case the remedy is against the railroad company, but if there is no substantial damage there can be no recovery.

John K. Thompson for appellant. *Warren N. Hauck, Geo. M. Roberts* and *Chas. W. Stapp* for appellees.

ELLIOTT, J. The appellant seeks by his complaint the abatement of a nuisance by the removal of a railroad track from William street, in the city of Lawrenceburgh, and also to obtain an injunction, and to recover damages. The trial court admitted evidence tending to prove that the appellant consented to the occupancy of the street, and assisted in making the fill upon which the track was laid. This evidence was clearly competent. An abutting owner who expressly assents to the occupancy of a street cannot afterward ask a court to enjoin the use of the street, or award him damages. *Wolfe v. Railroad Co.*, 15 B. Monr. 404; *Marble v. Whitney*, 28 N. Y. 297; *Murdock v. Railroad Co.*, 10 Hun, 598. In *Marble v. Whitney*, supra, the court, in speaking of the consent of the plaintiff to a change in a highway, said: "The plaintiff's consent was not a license that he could revoke after the alteration was made. Commissioners of highways may

act upon the parol consent of the owner in laying out or altering a highway across his lands, and although such consent may be revoked, it must be done before the road is laid out or the alteration made. If the commissioners act immediately on the faith of the virtual consent, by laying out the road or making the alterations, he will be estopped from denying the legality of the act. In *People v. Goodwin*, 5 N. Y. 568, it was held that a parol consent was sufficient, and, if not revoked before the commissioners acted on the faith of it, was irrevocable."

The liability of the appellee, the city of Lawrenceburgh, depends upon different rules from those upon which the liability of the railroad company depends, and we shall first dispose of the branch of the case involving the liability of the city. We have no doubt that an abutting owner has a proprietary right in the street, of which he cannot be deprived without compensation. *State v. Berdetta*, 73 Ind. 185, and cases cited; *Ross v. Thompson*, 78 Ind. 90; *City of Indianapolis v. Kingsbury*, 101 Ind. 200; *Town of Rensselaer v. Leopold*, 106 Ind. 29; 5 N. E. Rep'r. 761. But it by no means follows from this that a city, in granting a right to a railroad company to use a street, deprives the abutter of his property. The grant by the municipal corporation transfers no proprietary rights of the abutter; it simply grants the privilege the city has power to grant. In granting such a privilege, a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such a power. *Port of Mobile v. Railroad Co.*, 84 Ala. 115; 4 South. Rep'r, 106. Notwithstanding the grant by the municipality, the abutting owner has a right to recover such damages as he may have sustained by the additional burden imposed upon his land. *White v. Railroad Co.*, ante, 782 (this term). But the right of the abutter to compensation is against the railroad company, and not against the city.

It is true, that, where the grade of a street is changed, the abutter is entitled to such damages as he sustains. *City of Lafayette v. Wortman*, 107 Ind. 404; 8 N. E. Rep'r, 277. But while this is true, it is also true that where there are no damages there can be no recovery. There can be no recovery where there are no substantial damages shown, for the right to recover damages is purely statutory, since at common law there was no such right, and it is clear that it is only where actual damages are sus-

tained that an action will lie. *City of Kokomo v. Mahan*, 100 Ind. 242; *City of Anderson v. Bain*, 22 N. E. Rep'r, 323. Where there are no damages there can, it is quite clear, be no recovery under the statute, and the right is exclusively statutory.

It is found by the jury, in answer to the interrogatories submitted to them, that the property of the plaintiff was not injured; and their answers, we must infer, were adopted and acted upon by the court, so that there is, clearly enough, no case made against the city. It is incumbent upon a property-owner who seeks to recover damages for the construction of a railroad track in a street to show that the additional burden caused injury to his property. *Railway Co. v. Eberle*, 110 Ind. 542; 11 N. E. Rep'r, 467. Where the use of the street, and the changes made in it by the railroad company, actually benefit the abutting property, the owner certainly sustains no loss, and, if he sustains no loss, no property is taken from him. In this case the jury find that the construction of the railroad did not cause any damage to the complainant, and he cannot, therefore, maintain an action. There is a distinction between an action for taking a street for the use of a railroad, and an action to recover damages for the negligent and wrongful operation of the road, but, until there has been negligence or wrong in operating the road, no action to recover such damages will lie.

In one of the interrogatories submitted to the jury they were asked whether the plaintiff knew that the grade was being raised in front of his property, and whether he advised that it be done, and whether he assisted in making the fill, and the jury answered, "Yes; he did." It is evident, from what has already been said, that the fact thus found effectually defeats a recovery.

We have examined the evidence, and think it well sustains the finding and judgment. We have done this, notwithstanding the fact that we are strongly inclined to the opinion that the appellees are correct in asserting that the bill of exceptions is not properly in the record.

Judgment affirmed.

Railroads in streets — estoppel to claim damages. — One who induces a railroad company to locate its road upon the street in front of his property, or who consents thereto, will, after the invitation or consent has been acted upon, be estopped from claiming damages therefor, or from enjoining its operation.

Wolf v. Covington & Lexington R. Co., 15 B. Monr. 404; *Miller v. Railroad Co.*, 6 Hill, 61; *Murdock v. Prospect Park, etc., Co.*, 10 Hun, 598.

For a general discussion of the subject of railroads in streets, see *McQuaid v. Portland, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 34, and note, p. 47.

TOWN OF LONGMONT V. PARKER.

(23 Pac. R. 442; — Col. —.)

1. MUNICIPAL CORPORATIONS. LIABILITY FOR DAMAGE TO ABUTTING PROPERTY BY DITCH IN STREET. The defendant town constructed a ditch in the street in front of the plaintiff's property about fourteen feet wide and six feet deep, for supplying the town with water. The fee of the street was in the public. It was held that the plaintiff was entitled to recover the amount of depreciation to his property caused by the ditch.

2. CONSTITUTIONAL LAW. MEANING OF THE WORD "DAMAGED" IN THE CONSTITUTION. Under the provision of the constitution that "private property shall not be taken or damaged for public or private use without just compensation," the owner of property abutting on a street, who sustains a damage different in kind from that suffered by the general public, by reason of the use or improvement of the street, is entitled to recover to the extent of such damage.

3. RIGHT OF INGRESS AND EGRESS. Interfering with the right of ingress and egress to abutting property is a damage peculiar to the owner.

F. B. Secor and *B. L. Carr* for appellant. *Kinne & Way* for appellee.

REED, C. Parker, the appellee, plaintiff below, claimed to be the owner of a five-acre tract of land near the town of Longmont. Upon the trial, no direct proof of ownership of Parker was offered, but no objection was made on account of the kind of proof offered and admitted, and the ownership will be regarded as conceded by appellant on the trial. Plaintiff had a brick house and some other improvements on his land near the west line of the lot, and resided in it. The lot abutted upon the east line of the public highway, sixty feet in width. The house was about twenty-five feet from the line of the road. The defendant was a municipal corporation. In the spring of 1885, some time after the occupation of plaintiff commenced, and after the erection of the house and buildings, the defendant excavated a ditch, for the

purpose of supplying the town with water, in the highway in front of the residence of plaintiff, on the west side of the highway, the distance from the line of plaintiff's lot to the bank of the ditch being about forty-nine feet. Directly in front of the premises of plaintiff the ditch, at its greatest width, was from fourteen to seventeen feet, and its depth about six feet or more. Plaintiff's land abutted upon the highway, no part of which had been his property, the party from whom he acquired title having dedicated the land in the highway to public use previous to the sale of the land to plaintiff. Plaintiff brought this suit to recover damages to his property by the constructing and maintaining of the ditch. It is assigned for error that the court overruled the demurrer to the complaint. On examination, we do not think the grounds of demurrer well taken, or that the court erred in the judgment upon it. It is unnecessary for an understanding of the case that the pleadings be set out in full. It is sufficient to say that the issue presented for trial was whether the plaintiff's property had or had not been damaged by the excavation and existence of the ditch. The case was tried to a jury. The evidence was conflicting. Several witnesses testified to damage, varying in amount from \$300 to \$500; but their evidence in regard to the manner of arriving at the amount of damage and the elements of damage going to make up the aggregate was quite vague and indefinite. About an equal number of witnesses testified that in their opinion there was no damage. It was in evidence that the earth taken out in excavating the ditch was deposited in the road in front of the premises of plaintiff; a part of it had been removed by the defendant a short distance, and used in grading the road in front of plaintiff's property; and that this left the road higher in places than the adjoining land of plaintiff. The verdict was found for the plaintiff for \$150, and judgment entered upon the verdict.

Considerable latitude was allowed and indulged in in the way of proof upon the trial, and some very remote and novel elements of damage introduced, but no objection appears to have been made or exceptions taken. No exception was taken and no error assigned upon the instructions given. Taken as a whole, they substantially submitted the question of damage, and the law in this state, as announced in *City of Denver v. Bayer*, 7 Colo. 113;

2 Pac. Rep'r, 6, where section 15 of article 2 of the state constitution ("that private property shall not be taken or damaged for public or private use without just compensation") is carefully considered and applied; and where it was held that in a case like the present, where the land-owner had no fee in the land occupied as a highway, but his land abutted upon it, and he had rights therein not shared in common with the general public for purposes of travel and use, a party using or appropriating such highway, or a portion of it, for other and different purposes than the one contemplated, whereby the highway was obstructed and impaired as a means of ingress and egress, would be liable to the abutting land-owner for any consequential damages arising from such appropriation and use depreciating the value of the property. This application of the constitutional prohibition is well sustained by many authorities, particularly by the construction given by the English courts to the Land Clauses Consolidation Act and Railway Clauses Consolidation Act of 1845 (8 Vict., chaps. 18, 20). In those cases the words used are "injuriously affected," which are certainly in meaning and intention the same as the word "damaged," in our constitution. In those cases it has invariably been held that abutting owners, under circumstances like those presented in this case, could recover consequential damages to the extent of the lessened value of the property. The case of *Beckett v. Railway Co., L. R., 3 C. P. 82*, was tried before Cockburn, C. J. (1867). In that case the street by an embankment was narrowed from fifty to thirty-three feet opposite the property of the plaintiff, and upon the trial it was left to the jury to say from the evidence "whether there had been any diminution in the value of the plaintiff's house by reason of the construction of the road in front of it." Upon review, in the opinion of Bovill, C. J., the instruction was held to be correct, and it was said: "Now, the question arises whether the plaintiff's house in the case was 'injuriously affected,' * * * and whether there is damage sustained by the plaintiff," etc. Here it will be observed that the words "injuriously affected" are treated as synonymous with "damage," the word used in the constitution. Some states, notably Pennsylvania, have given provisions similar to that in our constitution a construction different from that given by this court. The language in section 8, article 16, of the constitution of Penn-

sylvania, is, "shall make just compensation for property taken, injured or destroyed." In *Railroad Co. v. Lippincott*, 116 Penn. St. 472; 9 Atl. Rep'r, 871, it was held that a depreciation of property by reason of the construction and operation of a railroad upon the lands of the company, was not an injury for which any damages could be recovered. But for the protection of individual rights, and as being more in harmony with the principles of the common law, we think the construction of this court and those of England better and more consonant with reason. Under the decisions of this court, the questions for the jury to determine from the evidence were whether the plaintiff suffered damages differing in kind from those suffered by the general public, and whether the property of the plaintiff had been lessened in value by the act of the defendant. It cannot be said, under the evidence, that the verdict was excessive. It was midway between nothing, as fixed by the defendant's witnesses, and \$300, the lowest estimate of witnesses for plaintiff. There having been no serious error in the admission of the testimony or charge by the court, the judgment should be affirmed.

Pattison, C., concurs. Richmond, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

1. *Ditch in street — taking.*— Where the constitution only required compensation to be made for property *taken* for public use, it was held that damage to abutting property by a ditch in the street, which had become greatly enlarged by erosion, so as to materially impair access to the property, was not actionable; *Godall v. Milwaukee*, 5 Wis. 82; and see *Fisk v. Springfield*, 118 Mass. 88.

2. *Meaning of the words "damaged," "injured" and the like in constitutions and statutes.*— Many of the state constitutions now provide that compensation must be made for property "damaged" or "injured" as well as for property "taken" for public use. See *Lewis Em. Dom.*, § 221. The following may be regarded as leading cases on the construction of these words: *Rigney v. Chicago*, 102 Ill. 64; *Chicago, etc., R. Co. v. Ayers*, 106 Ill. 511; *Gottschalk v. Chicago, etc., R. Co.*, 14 Neb. 550; *Omaha v. Kramer*, 25 Neb. 489; *Chicago, etc., R. Co. v. Hazels (Neb.)*, 42 N. W. Rep'r, 93; *Hot Springs R. Co. v. Williamson*, 45 Ark. 429; *City Council of Montgomery v. Townsend*, 80 Ala. 489; *Reardon v. San Francisco*, 66 Cal. 492; *Denver v. Bayer*, 6 Colo. 118; *Atlanta v. Green*, 37 Ga. 386; *Galveston, etc., R. Co. v. Fuller*, 63 Tex. 467; *Johnson v. Parkersburg*, 16 W. Va. 402; *Reede v. St. Louis (Mo.)*, 6 S. W. Rep'r, 257; *Pennsylvania R. Co. v. Miller*, 1 Am. R. R. & Corp.

Rep. 15. The construction of these words is fully treated in Lewis Em. Dom., chap. VIII.

The construction of the words "injuriously affected" in the English statutes as to taking private property for public use is fully considered and settled in *McCarthy v. Metropolitan Board of Works*, 7 Eng. & Ir. App. 243; *Caledonian Ry. v. Walker's Trustees*, 7 App. Cas. 259.

BUCK V. CITY OF BIDDEFORD.

(19 Atl. R. 912; 83 Me. 433.)

1. MUNICIPAL CORPORATIONS. DEFECTIVE STREETS. SUNDAY TRAVELING. Traveling on the Lord's day may be justified on the ground of necessity or as a deed of charity.

2. A woman visiting at the plaintiff's house informed him on the Lord's day that she had got to go home that night, a distance of some two miles, on a cold, windy day in December. He thereupon took her home with his horse and sleigh. Held, that the act was not unlawful.

3. DEFECTIVE GRATING OVER CESS-POOL. A way is defective when there is a cess-pool in it, with an iron grating or cover having between its bars and rim a space wide enough to receive a horse's foot.

4. NOTICE OF DEFECT. In an action to recover damages by reason of a defective way, it appearing that the cover to a cess-pool, which created the defect, was placed there by a street commissioner, held, that no other or further notice is necessary.

5. WHOLE WIDTH OF CITY STREET SHOULD BE FREE FROM DEFECTS. A traveler has the right to presume that he may drive with safety over all parts of a street which is a public thoroughfare of a city. He is not required to leave his team in the middle of the street while stopping, but may drive to the side of the street, and near the curbing.

Hamilton & Haley for plaintiff. *E. Stone* for defendant.

WALTON, J. As the plaintiff was driving along one of the streets of the city of Biddeford, his horse's foot slipped into the grating covering a cess-pool, and the horse was thereby thrown down, and so badly injured that it was necessary to kill him. The plaintiff claims that the city is liable for the value of his horse. The city denies its liability.

1. The accident occurred on Sunday, and it is claimed that on this account the plaintiff is precluded from recovering. We think not. It is true that all unnecessary traveling on the Lord's day is prohibited. So are all other kinds of worldly business. And it has been decided that, when one receives an injury through a

defect in a highway, while unlawfully traveling on the Lord's day, a recovery for the injury cannot be had. *Cratty v. Bangor*, 57 Me. 423. But all traveling on the Lord's day is not unlawful. If it was, one could not visit the sick, or go to church, nor attend a funeral, on that day, without being guilty of a crime. And it was held in *O'Connell v. Lewiston*, 65 Me. 34, that one might lawfully travel on the Lord's day for exercise in the open air. And it was held in *Crosman v. Lynn*, 121 Mass. 301, that to go after a domestic on the morning of the Lord's day, and bring her home to assist in the preparation of the morning meal, was not unlawful; that such an act might properly be regarded as a work of necessity. In this case a woman had been visiting at the plaintiff's house, and she informed him on the Lord's day that she had got to go home that night. It was in December. The day was cold and windy, and the distance was two miles. He thereupon took his horse and sleigh, and was carrying her home at the time of the accident. We do not think the act was unlawful. We think it may be justified on the ground of necessity or as a deed of charity.

2. It is claimed that the way was not defective. We think it was. It had a cess-pool in it, with an iron cover; and the evidence shows that between one of the outside bars and the rim was a space wide enough to receive a horse's foot, and that such was the width of the space was demonstrated by the fact that the foot of the plaintiff's horse did slip into it, and was there held so fast as to throw him down, and it was with great difficulty that his foot was extricated; and, when it was extricated, it was so torn and injured that the horse was ruined, and had to be killed. We think the street must be regarded as having a very dangerous defect in it.

3. Another question is whether the city had sufficient notice of the defect. We think it did. It was decided in *Holmes v. Paris*, 75 Me. 559, that when one of the officers of a town to whom notice of a defect may be given, himself creates a defect by placing some object dangerous to travelers within the limits of the highway, and leaving it there, the statutory notice of twenty-four hours is unnecessary; that "notice of a fact to a person who already knows the fact cannot be useful." And this case falls within the principle of that case. The cover to the cess-pool,

which created the defect, was placed there by a street commissioner of the city. He knew its condition from the beginning, and no other or further notice was necessary.

4. It is claimed that at the time of the accident the plaintiff was not in the exercise of due care. We think he was. It is true that he was not in the middle of the street. He had driven to the side of the street, and was near the curbing. But he was properly there. He had reached the end of his journey, and was about to stop. Surely, he could not be required to leave his horse and sleigh in the middle of the street while stopping. And his was not a road in the country, the sides of which had been left unprepared for travel. It was one of the public thoroughfares of a city, over all parts of which a traveler had a right to presume he could drive with safety. We think the plaintiff was in the exercise of reasonable care.

5. Damages. The plaintiff's horse was so badly injured that, after keeping him nine or ten days, and finding that a cure was probably impossible, it was deemed advisable to kill him, and he was killed. The evidence satisfies us that he was worth before the injury \$150, and we think the plaintiff is entitled to recover that amount.

Judgment for plaintiff for \$150 damages.

Danforth, Virgin, Emery, Foster and Haskell, JJ., concurred.

1. Sunday traveling — whether a bar to a suit for negligence. — Delaware, etc., R. Co. v. Trautwein, 1 Am. R. R. & Corp. Rep. 688.

2. When duty to keep entire width of street in repair. — Goeltz v. Town of Ashland, 1 Am. R. R. & Corp. Rep. 442, and note; Brown v. Inhabitants of Skowhegan, ante.

GULF, C. & S. F. RY. CO. v. COMPTON.

(138. W. R. 667; 76 Tex. 667.)

1. RAILROAD COMPANIES. SUIT FOR NEGLIGENTLY CAUSING DEATH. EVIDENCE. Plaintiff's intestate was a fireman on a water train operated by appellant on a single-track road and was killed by a collision with a passenger train. A conversation between the engineer of the water train and a telegraph operator in reference to the point of meeting the passenger train was held to be admissible as a part of the transaction.

2. **RUNNING TRAIN WITHOUT A CONDUCTOR.** Though the proof showed that it was customary for railroads to equip such trains with a conductor, engineer, fireman and brakeman, yet the operation of the train in question without a conductor was not necessarily negligent, but the question would be whether that method was, under the circumstances, reasonably safe.

3. **EXPERT TESTIMONY.** A hypothetical question addressed to an expert need not embrace, in its assumptions, all the facts which the evidence tends to establish, but no facts should be assumed which the evidence does not warrant.

4. **MEASURE OF DAMAGES.** The plaintiff was the sole surviving parent of the deceased, who was a minor. Held, that the right of recovery was not limited to the wages which deceased might have earned during his minority, but that she was entitled to recover any prospective pecuniary loss as well as during the minority of deceased.

5. **EXPECTATION OF LIFE.** Plaintiff was the sole beneficiary of the suit. Held, that it was not necessary to prove her expectation of life, but that the jury might judge thereof from her age and physical condition.

6. **EXEMPLARY DAMAGES.** In this class of actions, exemplary damages cannot be recovered.

7. **PRECAUTIONS AFTER THE ACCIDENT.** Evidence that ever since the accident appellant had employed a conductor on its water trains, was held to have been properly excluded.

J. W. Terry for appellant. *Brady & Ring* and *Parker & Pearson* for appellee.

GAINES, J. This suit was brought by appellee against appellant to recover damages for injuries resulting in the death of Alexander Compton, her minor son. His death was alleged to have been caused by the negligence of the defendant company. The son was eighteen years old at the time of the accident, and had, with the consent of plaintiff, been employed by the defendant in its shops as a "wiper," whose duty it was to clean engines. On the afternoon of the day of his death, he was sent out on a water train as fireman. The train left Galveston about 4 o'clock P. M., and ran to Duke, a station four miles north of the city. Upon the return trip, at about half past 9 o'clock at night of the same day, it collided with a passenger train running north. The plaintiff's son was killed by the collision. The accident occurred south of the station known as "Alvin" and north of that known as "Hitchcock." The train consisted of eleven water-cars and an engine, and was operated on the trip by an engineer named Hitchcock, Alexander Compton, who acted as firemen, and one brakeman. The plaintiff adduced testimony tending

strongly to show that it was a general custom among railroad companies to man such trains with a conductor, an engineer, a fireman and at least one brakeman, and that it was not regarded as prudent to run such a train without such employes. The facts were very fully alleged in the petition, and the negligence of the company in failing to send out a conductor in control of the train was charged to be the proximate cause of the injury. The defendant pleaded a general demurrer, and specially answered that the accident was caused by the negligence of Hitchcock, the engineer, who was the fellow-servant of Alexander Compton, the deceased, and that, therefore, the plaintiff could not recover.

During the progress of the trial, defendant's counsel offered to prove by a witness the following facts: That he (the witness) was present at Duke station in the afternoon of the night of the 18th of November, just before the water train which afterward collided with the passenger train left Duke for Galveston, and that he heard the following conversation between the operator at Duke and a man who got off the engine of the water train, who was either the engineer or fireman: The operator told the man he ought to meet the passenger train at Alvin. The man then said to the operator: "I am hungry. Can't we make Hitchcock?" a station south of Alvin and south of Halls; to which the operator said: "No." The man then got on the engine, and the train departed in the direction of Galveston. When the witness was asked how he knew that this man was the engineer or fireman, he stated that he did not remember the appearance of the man well enough to describe him. He looked like he had been working on the engine. He got off the engine, had the conversation with the telegraph operator, then got back on the engine, and went off with the engine. The plaintiff objected to the testimony on the grounds: "(1) that it was hearsay; and (2) that the witness did not identify the man as the engineer." The evidence was excluded. We are of opinion that this was error. The testimony tended to prove that an order was given to the person in charge of the train to stop at Alvin, and to await the passage of the north-bound passenger train, and that his desire was to hasten forward, and to meet the latter train at Hitchcock. Therefore, its tendency was to show that the accident was the result of the negligence of the engineer. The conversation was

a part of the transaction, and was, as such, admissible. It was, therefore, not hearsay, as is claimed in the first ground of objection. *Railway Co. v. Collier*, 62 Tex. 318. The second ground of objection was not more tenable. The witness, it is true, did not know the engineer, and could not describe him; but the facts that there were but two persons on the engine; that the man in question left the engine apparently for instructions; and immediately resumed his place upon it, and that the engineer was the proper person to receive the orders, together with the conversation itself, were circumstances which, taken together, tended very strongly to show that he was the engineer. If the engineer believed that he could reach Hitchcock before meeting the passenger train, and if he attempted to accomplish this contrary to his instructions, and thereby caused the collision, then the accident was not the result of the failure to provide the train with a sufficient number of men to operate it safely in every emergency, but was proximately caused by the engineer's own negligence. It is insisted on behalf of appellee that, if the company was negligent in sending out the train without a conductor, and the collision would not have occurred if the conductor had been sent, it is liable for the injury notwithstanding the engineer may have been negligent. But we are not of that opinion. We think that, if the accident would not have happened but for the negligence of Hitchcock, his want of care was the proximate cause of the injury, and that the result cannot be imputed to the negligence of the defendant in failing to provide a conductor for the train. For this reason, we think the testimony which was excluded was relevant and material, and, being legal, that its exclusion is error for which the judgment must be reversed.

Since the judgment is to be reversed, we consider it unnecessary to discuss at length the correctness of that part of the charge of the court which is complained of in appellant's third assignment. We think the charge is objectionable because it gives too much prominence to the alleged custom of other railroad companies to send out trains equipped with a conductor in addition to the engineer and brakeman. We are of opinion that the mere fact that railroad companies generally adopted such a custom would not make it negligent in the defendant company to fail to observe it, provided its method of operating its trains was, in

point of fact, reasonably safe. The paragraph of the instructions in which the law is applied to the facts of the case is as follows: "If you believe from the evidence that an established rule, custom or usage prevailing in the railway service in Texas on properly-regulated railroads was violated in the sending out of the said water train in charge of the engineer, Hitchcock, unaccompanied by a conductor, and that the observance of such custom or usage so violated was reasonably necessary for the reasonable safety of the defendant's employes and the public generally, and that such usage was violated with the knowledge, or with the consent or acquiescence, of defendant's general managing officers, or that they failed to use reasonable diligence in enforcing the observance of the same, and were thereby guilty of negligence, and that such negligence on their part was a direct or proximate cause of said collision, and that Alexander Compton, deceased, when he went out with said Hitchcock on the occasion on which he was killed, did not know the existence of such rule, custom or usage, or, if he did know of the same, he did not know of the danger resulting from violation of the same, and that, under the circumstances, he could not reasonably have been expected to have had such knowledge, you will find for the plaintiff; otherwise you will find for the defendant." We are not prepared to say that this involves any legal proposition that is not sound. But, taken in connection with the previous portions of the charge, we think the jury may have concluded that, if the custom of other railroad companies was proved, it was negligence in the defendant company not to observe it, without reference to the fact whether the presence of a conductor upon the train in question was reasonably necessary to its safety or not. Without deciding whether or not the judgment should be reversed on account of the charge, we deem it sufficient to intimate its defect, in order that it may be remedied upon another trial.

In course of the trial the court admitted, over the defendant's objection, the answer of certain witnesses, shown to be experts, to the following hypothetical question: "It is claimed in the case at bar that an ordinary water train, consisting of eight or twelve cars, was sent from a certain city in southern Texas to a point some forty miles, or thereabout, distant therefrom, for the purpose of getting at said point a load of water from an ordinary

water-tank, and then return to said city with the water on the same day; that said train, on said trip, left said city about 4 or 4:30 P. M. in the afternoon of a certain day in the month of November; that the said forty miles of railroad track over which the train was sent between said city and the point to which the above train was going for the water was then being used by four daily passenger trains and the same number of regular daily freight trains, while about twenty-eight miles of the same track was then being used by two more daily passenger trains, it being a single track, and in first-class condition. Please state the number of employes which, in accordance with ordinary rules, customs or usages of the railway service, would accompany said water train, on said trip, and state the names of the positions that each of such employes, respectively, would hold on such trains, and the duty which each man would perform in connection therewith." The answer admitted was as follows: "Such a special train would, ordinarily, be accompanied by an engineer, fireman, conductor and two brakemen. The engineer would attend to his engine; the fireman would assist the engineer; and the conductor have full control of the employes of the train, would look out for the running of the train, and would see that it kept out of the way of all trains, and would run according to orders from the dispatcher's office. One brakeman would be at the rear end of the train, and the other at the head end." The evidence was objected to on the ground that the hypothetical case upon which the opinion of the witnesses was asked was not the precise case shown by the evidence. There was evidence to show that during the hours required for the water train to make the trip from Galveston to Duke, and to return, there were but two regular trains assigned to run on that part of the road — one going north and the other south — although, during the twenty-four hours, eight trains did run as stated in the question. Concerning this matter, there was no conflict in the evidence. It is, therefore, insisted that the question should have been whether or not it would have been safe to operate a train such as is described in the question over a road where, during the time of its trip, it would meet but two trains. We understand the rule to be that the opinion of an expert upon an hypothetical case will be excluded unless there be evidence tending to prove the supposed facts; but we have found no authority which holds

that an hypothetical case must embrace every fact proved, or which there is evidence tending to prove. In *Filer v. Railroad Co.*, 49 N. Y. 42, it is said: "Some latitude must necessarily be given in the examination of medical experts and in propounding hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury as the counsel by his question assumes them to be, the opinion may have some weight; otherwise, not. It is the privilege of counsel, in such cases, to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed.' The facts assumed in the question before us were established by the evidence in the case. If counsel for defendant desired the opinion of the witnesses as to the safety of operating a train between the hours when only two other trains were to be encountered, he could upon cross-examination have asked his opinion based upon that state of facts. We think there was no error in admitting the testimony.

The court did not err in refusing the following instruction asked by appellant: "You are instructed that the measure of damages in this case is the value of the services of Alexander Compton from the day of his death to the time he would have attained the age of twenty-one years, less the cost of his maintenance and support during that period." The appellee, being the sole surviving parent of Alexander Compton, was entitled to his services during minority, and hence, at common law, could have recovered their value during that period in the event the appellant was found liable for the injury. But it does not follow that this right abridges in any manner her claim for the compensation given by the statute. R. S., art. 2899 et seq. It happens in this particular case that the plaintiff, being the sole surviving parent of the deceased, is entitled to recover, if at all, damages not only for the loss of services during her son's non-age, but also for the loss of any prospective pecuniary benefits which she may have received from him after he attained his majority. She has sued for the whole in the statutory action, as we think she had the right to do, and her right to recover in such action cannot be restricted to the period of her son's minority.

Neither did the court err in refusing to charge the jury that, by reason of the plaintiff's failure to prove her expectancy of life, she could recover damages only for the loss of her son's services during his minority. Evidence of the probable duration of life by experts in the business of life insurance is admissible in such cases, but is not necessary. Our statute contemplates that the jury shall judge of this upon proofs being made of the party's age and physical condition. It was, in effect, so held in two cases decided by this court at the last Tyler term. *Railroad Co. v. Lester*, 75 Tex. 56; 12 S. W. Rep'r, 955; *Railway Co. v. Lehmberg*, 75 Tex. 61; 12 S. W. Rep'r, 838.

The questions presented by the other assignments of appellant are not likely to arise upon another trial, and need not be considered.

The appellee presents the following cross-assignments of error: "The court erred in charging the jury as follows: 'You are charged that you can find no exemplary damages in this case;' and also in failing to give the second special charge requested by plaintiff, the same embracing the issue of exemplary damages." We are of the opinion that the court did not err in giving the instruction quoted in the assignment, or in refusing that requested by appellee. The plaintiff does not allege in her petition the value of her son's services during his minority, and hence her suit must be considered as brought wholly under the statute. In *Winnt v. Railroad Co.*, 74 Tex. 32; 11 S. W. Rep'r, 907, it was held that in such a case the mother cannot recover exemplary damages. Besides this, it appears from the evidence that no collision had occurred upon defendant's road for many years, and it is alleged in the petition that the defendant had run the water train in question without a conductor for the space of twelve months. It was shown that the road from Galveston bay to Duke was straight and level, and that there were but two regular trains to be passed in making the trip. If the train had run regularly for twelve months without a conductor and without accident, it was not gross negligence, on the occasion in question, to send it out in the same manner. The evidence did not warrant a recovery of exemplary damages, even if the statute had given such damages to the parent in such a case.

During the trial, appellee offered to prove by a witness that,

ever since the accident, defendant's water train had been accompanied by a conductor. The testimony, upon objections being made by defendant, was excluded by the court. The court did not err in its ruling. This court has held that, in a suit for damages claimed to result from the negligence of a railroad company, it is not competent for the plaintiff to show that after the accident the company have taken additional measures to prevent a recurrence of the casualty. *Railway Co. v. McGowan*, 73 Tex. 355; 11 S. W. Rep'r, 336, and cases cited. For the errors pointed out the judgment is reversed, and the cause remanded.

Precautions after the accident.—In a suit to recover damages for an injury occasioned by the negligence of the defendant, the better rule is that evidence of precautions taken after the injury, to prevent the recurrence of similar accidents, is inadmissible. The reason of the rule is well stated in the following quotation from recent decisions on the subject. The supreme court of Minnesota, after having held that such evidence was admissible, overruled its former decision, and in doing so said:

"But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is, on principle, wrong; not for the reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law requires, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." *More v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 468-470.

The supreme court of Connecticut, in a recent case, review the decisions at length, and, after quoting from the Minnesota case above cited, says: "We may well adopt this reasoning of the Minnesota court as covering the entire ground in a few words. Courts that have taken a different view of this question seem to us to have overlooked the changed condition under which the acts subsequent to the action have been done. The fact that an accident has happened and some person has been injured, immediately puts a party on a higher plane of diligence and duty from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting. If the subsequent act is made to reflect back upon a prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element

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and test of negligence which has no business there, not being in existence at the time." *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; 50 Am. Rep. 52.

These views are also supported by the following cases: *Dongan v. Champlain Trans. Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Sellers v. Del. & H. Co.*, 8 Hun, 338; *Payne v. Troy & Boston R. Co.*, 9 Hun, 526; *Morrell v. Peck*, 24 Hun, 37; *Cramer v. Burlington*, 45 Iowa, 625; *Hudson v. C. & N. W. R. Co.*, 59 Iowa, 581; *Sweetland v. Ill. & M. Tel. Co.*, 27 Iowa, 434; *Eli v. St. Louis, etc., Ry. Co.*, 77 Mo. 34; *Gulf, etc., Ry. Co. v. McGowan*, 73 Tex. 355; *Hodges v. Percival*, 132 Ill. 53.

A contrary doctrine is held in *Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 315; *West Chester, etc., R. Co. v. McElwee*, 67 Penn. St. 311; *McKee v. Bidwell*, 74 Penn. St. 218.

Where the defendant introduces diagrams which are claimed to show the condition of the premises where the accident happened, the plaintiff may show that changes have been made in the premises between the time of the accident and the time of making the diagram, in order to show that the diagram does not correctly represent the premises as they were at the time of the accident. *McRickard v. Flint*, 114 N. Y. 222. The court, however, approve the general rule as above given.

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SAME v. CINCINNATI, N. O. & T. P. RY. CO.

(25 N. E. R. 928; — Ohio St. —.)

1. RAILROAD COMPANIES. JURISDICTION TO PREVENT DISCRIMINATION RESPECTING INTERSTATE COMMERCE. Where a railway company incorporated under the laws of this state misuses a franchise, privilege or right conferred upon it, or claims the right to exercise, or has exercised, "a franchise, privilege or right in contravention of law," this court has jurisdiction to inquire into and correct the mischief, though the corporation may be engaged in interstate commerce, and the misuser or usurpation to be corrected relate to and concern that traffic.

2. DISCRIMINATION UNLAWFUL. A corporation created by this state, and engaged in carrying goods for hire as a common carrier, has no franchise, privilege or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.

3. WHAT CONSTITUTES EXERCISING "A FRANCHISE, PRIVILEGE OR RIGHT IN CONTRAVENTION OF LAW." Where such corporation fixes a rate of freight per one hundred pounds, for carrying petroleum oil in iron tank cars, substantially lower than its rate for transporting it in barrels in car-load lots, it is exercising "a franchise, privilege or right in contravention of law," within the meaning of the fourth clause of section 6761, R. S.

QUO WARRANTO. The pleadings, together with the report of the referee, Hon. Channing Richards, disclose that the cities of Marietta, Ohio, and Parkersburg, W. Va., are situated on opposite sides of the Ohio river, about twelve miles apart; that one of the defendants, the Cincinnati, Washington and Baltimore Railway Company, owns and operates a railway that connects Marietta directly, and, by means of a railway bridge across the Ohio river at Parkersburg, the latter place, also, with the city of Cincinnati, Ohio, where it has connections with an extensive system of railways operated by the other defendant, the Cincinnati, New Orleans and Texas Pacific Railway Company, both which railway companies are corporations created by and under the laws of this state; and that the entire line of the first-named company lies within the state, while only about one mile of the extensive system operated by the last-named company is so located, the remainder thereof extending through the states south of the Ohio river; that the Camden Consolidated Oil Company, a branch of the Standard Oil Company, owns and operates an extensive establishment at Parkersburg, W. Va., for refining petroleum oil; and that there are a number of smaller establishments at Marietta, Ohio, engaged in the same business, not connected, however, with the Standard Oil Company, one of which, owned and operated by George Rice, is of considerable magnitude, though much less extensive than the Camden Consolidated Oil Company; that the several owners of these oil refineries mainly depend for transporting their finished product to its principal market, the towns and cities south of the Ohio river, upon the railways owned or operated by the defendants, both of whom are common carriers of freight and passengers; that there are two methods of transporting oil to market, in use by refineries and wholesale dealers — one in barrels shipped in car load lots, in cars furnished by the carrier; the other in iron tank cars owned and furnished by shippers — and that defendants furnished no tank-cars and did not hold themselves out as prepared to transport oil in that way, and that the tank-cars on the road of the Cincinnati, Washington and Baltimore Railway Company were owned and controlled by the Camden Consolidated Oil Company, while those on the road of the Cincinnati, New Orleans and Texas Pacific Railway Company were owned and controlled by the Chess-Carly Company, a branch of the Standard Oil Com-

pany, located in Kentucky, and that the Camden Consolidated Oil Company and the Chess-Carly Company usually adopted the iron tank-car method of shipment, all other refiners using the barrel method only; that for some years prior to the bringing of this action the freight rates established by defendants for transporting oil in tank-cars were made much lower than those for transporting it in barrel packages, in car-load lots, and that the rates charged George Rice, and other refiners and wholesale shippers over these railroads by the barrel method, were much higher than the rates charged the Camden Consolidated Oil Company and the Chess-Carly Company, respectively, for similar services by the barrel method. So that, whatever method was adopted, a marked discrimination was made in favor of these two companies. Any further statement of facts necessary to understand the decision will be found in the opinion.

W. B. Loomis and *A. D. Follet* for relator. *McClintock & Smith* and *E. W. Strong* for Cincinnati, W. & B. Ry. Co. *Harmon, Colston, Goldsmith & Hoadly* for Cincinnati, N. O. & T. P. Ry. Co.

BRADBURY, J. (after stating the facts as above). These actions are brought under the fourth clause of section 6761, R. S., which authorizes an action of *quo warranto* to be brought against a corporation when it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds, by contract or otherwise, or has exercised, a franchise, privilege or right, in contravention of law. The petitions charge, among other things, that the defendants misused their corporate powers and franchises by discriminating in their rates of freight in favor of certain refiners of petroleum oil connected with the Standard Oil Company, by charging other shippers of like products unreasonable rates, by arbitrarily and suddenly changing the same, and, finally, by confederating with the favored shippers to create and foster a monopoly in refined oil, to the injury of other refiners and the public; and, further, that the defendants claimed and exercised, in contravention of law, the right to charge, for shipping oil in tank-cars, a lower rate of freight per hundred pounds than they charged for shipping the same in barrels, in car-load lots. The

defendants, by answer, among other matters, denied charging any shippers unreasonable rates of freight, or that they arbitrarily or suddenly changed such rates, and denied any confederacy with any one to establish a monopoly. The actions were referred to a referee, to take the evidence, and to report to this court his findings of fact and conclusions of law therefrom — all which has been done; and the cases are before us upon this report.

To the report of the referee, exceptions were filed by all parties. The defendants, however, do not now insist upon their exceptions to the finding of the referee, in so far as it relates to the facts. Indeed, it is difficult to conceive any grounds for their doing so, for these findings are mainly based upon the testimony of the officers and agents of the railroad companies. On the other hand, however, counsel for the relators urge upon us with much force their exceptions to the facts as they were found by the referee; four of which findings, at least — the eighth, ninth, twenty-second and twenty-third — deserve consideration. The eighth was that the open rate of freight made for the public for oil was not excessive; and the ninth, that those open rates were not frequently or arbitrarily changed. Without absolutely committing ourselves to the correctness of these findings, we think they are made immaterial by other findings, that require the rendition of the same judgment that should have been rendered had these two findings been the reverse of what they are.

The twenty-second and twenty-third findings of fact should be considered together. The first of the two negatives the existence of a conspiracy or confederation between either of the defendants and the Camden Consolidated Oil Company on the one hand, or the Chess-Carly Company on the other, to foster or create a monopoly in the traffic in petroleum oil, while the other one rests the action of the railroad companies in giving rebates and special rates to these favored shippers upon the necessity they were under of doing so to secure large shipments of oil over their roads which would otherwise have been lost to them. It is contended, in this connection, that, as the evidence shows, and the referee in another part of his report found, that this action of the railroad companies tended to create a monopoly, and to injure the business of George Rice, in all the markets reached by their lines, and in some instances did in fact create a monopoly, they, especially as their

officers were men of large capacity and wide experience in the affairs of the commercial world, must be held to have contemplated and intended these natural results. It is true that in relation to many matters, both civil and criminal, one must be held to intend the natural and probable consequences of an act, and cannot be heard to deny it. We think the principle hardly applicable here, and that the charge of an actual conspiracy by the defendants, with others, to misuse the franchises conferred on them by the state, to injure the public, is not necessarily sustained by proof that a course was pursued beneficial to their interests, though it tended to, and in fact did, produce that result. The inference thus arising is to be given due force, but is not conclusive, and the fact of conspiracy is to be established, if at all, from a consideration of all the circumstances in the case; and we cannot say, in view of all those circumstances, that the finding of the referee in this respect is not supported by the evidence. The exceptions to the report are, therefore, overruled.

All of the oil of the Camden Consolidated Oil Company that was transported over the Cincinnati, Washington and Baltimore railroad, all of that which was refined by George Rice and other refiners operating at Marietta, Ohio, which was carried south of the Ohio river, and all of that belonging to any of those parties which was transported over the Cincinnati, New Orleans and Texas Pacific railway, was commerce between the states, the regulation of which, by the constitution of the United States, is denied to the several states; and, as the discrimination of which complaint is made in this action relates to this traffic, defendant's counsel contend that this court has no jurisdiction of the subject. No doubt the regulation of interstate commerce belongs exclusively to the national government, but does the controversy now before us, in any proper sense of the term, relate to a regulation of commerce between the states? Does this exclusive right in congress to regulate interstate commerce preclude any action by a state upon any subject that may incidentally affect such commerce? Certainly a state cannot be compelled to create corporations in aid of, or to facilitate, commerce between the states; but, if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the state? That the power to reg-

ulate commerce between the states cannot safely be pressed to such extreme consequences is, we think, recognized by the supreme court in *Robbins v. Taxing Dist.*, 120 U. S. 489; 7 Sup. Ct. Rep'r. 592. The corporation has received vitality from the state. It continues during its existence to be the creature of the state, must live subservient to its laws, and has such powers and franchises as those laws have bestowed upon it, and none others. As the state was not bound to create it in the first place, it is not bound to maintain it, after having done so, if it violates the laws or public policy of the state, or misuses its franchises to oppress the citizens thereof. For such offenses the state, acting through its legislature and courts, and in the exercise of a sound discretion, may either destroy the corporation entirely, by forfeiting its charter or oust it from the wrongful exercise of its powers; and if, instead of or in addition to misusing the franchises actually conferred, it usurps others, the circumstance that the usurped franchises relate to and concern commerce between the states ought not to deprive the state of its visitatorial power. If the state creating the corporation is deprived of this power, none exists elsewhere. "The government creating the corporation can alone institute such a proceeding [*quo warranto* to adjudge of forfeiture of a corporate franchise], since it may waive a broken condition of a compact made with it." *Ang. & A. Corp.*, § 777, and cases cited. See note 6.

That the Cincinnati, Washington and Baltimore Railway Company did discriminate in its rates for freight on petroleum oil in favor of the Camden Consolidated Oil Company, and that the Cincinnati, New Orleans and Texas Pacific Railway Company did the same in favor of the Chess-Carly Company, is shown by the finding of the referee, which is clearly sustained by the evidence. That these discriminating rates were in some instances strikingly excessive, tended to foster a monopoly, tended to injure the competitors of the favored shippers, and were in many instances prohibitory, actually excluding these competitors from extensive and valuable markets for their oil, giving to the favored shippers absolute control thereof, is established beyond any serious controversy. The justification interposed is that this was not done pursuant to any confederacy with the favored shipper, or with any purpose to inflict injury on their competitors, but in order that

the railroad companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of the difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the interests of others; but we do hold that they cannot be permitted to foster or create a monopoly, by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made, and upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law. A full and complete discussion of the principles, and a thorough collation of the authorities, bearing upon the duties of railroad companies towards their customers, is to be found in the opinion of Judge Atherton, in the case of *Scofield v. Railway Co.*, 43 Ohio St. 571; 3 N. E. Rep'r, 907, to which nothing need be now added.

It appears that, of the two methods of shipping oil—that by the barrel, in car-load lots, and that in tank-cars—the first only was available to George Rice, and the other refiners of petroleum oil at Marietta, Ohio, as they owned no tank-cars, nor did the defendants own or undertake to provide any; but that both methods were open to the Camden Consolidated Oil Company and the Chess-Carly Company, by reason of their ownership of tank-cars, and that the rate per barrel in tank-cars was very much lower than in barrel packages, in box-cars; that in fact the Cincinnati, Washington and Baltimore Railway Company, after allowing the Camden Consolidated Oil Company a rebate, and allowing the Baltimore and Ohio Railway Company for switching cars, received from the Camden Consolidated Oil Company only about one-half of the open rates it charged the Marietta refiners, and that both railroad companies claimed the right to make different rates, based upon the different methods of shipping oil, and the fact of the ownership by shippers of the tank-cars used by them. It was the duty of the defendants to furnish suitable vehicles for

transporting freight offered to them for that purpose, and to offer equal terms to all shippers. A railroad is an improved highway. The public are equally entitled to its use. It must provide equal accommodation for all, upon the same terms. The fact that one shipper may be provided with vehicles of his own entitles him to no advantage over his competitor not so provided. The true rule is announced by the interstate commerce commission in the report of the case of *Rice v. Railroad Company*: "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight, when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (*Railroad Co. v. Pratt*, 22 Wall. 123), and then to offer their use to everybody, impartially." 1 Int. St. Com. Rep. 547. No doubt a shipper who owns cars may be paid a reasonable compensation for their use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but it is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car. The duty of providing suitable facilities for its customers rests upon the railroad company; and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight-cars to be placed upon its track by any customer for his private use, ex-

cept upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practiced at the will of the railroad company, and the favored shipper.

The advantages, if any, to the carrier, presented by the tank-car method of transporting oil over that by barrels, in box-cars, in car-load lots, are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way ; but, if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty, it could not, in justice, avail itself of its own neglect as a ground of discrimination. It must either provide tank-cars for all its customers alike, or give such rates of freight in barrel packages by the car-load, as will place its customers using that method on an equal footing with its customers adopting the other method.

Judgment ousting defendants from the right to make or charge a rate of freight per one hundred pounds for transporting oil in iron tank-cars, substantially lower than for transporting it in barrels, in car-load lots.

BATES ET AL. V. INHABITANTS OF WESTBOROUGH.

BATES V. SAME.

(23 N. E. R. 1070 ; — Mass. —.)

1. MUNICIPAL CORPORATIONS. FLOODING CAUSED BY OVERFLOW FROM SEWER. Plaintiff had a prescriptive right to discharge the water from his land by a drain to a certain culvert which connected with a box drain. By reason of obstructions in the culvert and box drain, and the leading of additional sewers into it, the water from which operated as a sort of dam upon the plaintiff's drain, the water was set back through his drain and flooded his premises. Held, that if the town had been negligent in not keeping the culvert and box drain free from obstructions, or in making the box drain too small or in constructing and maintaining other drains that by themselves, or in connection with the culvert, made a faulty arrangement for disposing of the surface-water, and thus caused the damage complained of, it would be liable.

2. RIGHTS RESPECTING SURFACE-WATER. If a private land-owner collects

surface-water into a definite artificial channel and discharges it upon his neighbor's land he is liable to an action. The same would be true if the water was reflected upon the plaintiff's land by an obstacle in its direct course which such owner had set up, or negligently allowed to remain. Similar liabilities rest upon municipal corporations respecting their drains and sewers.

W. S. B. Hopkins and *J. E. Beeman* for plaintiffs. *F. P. Goulding* and *W. T. Forbes* for defendant.

HOLMES, J. These are two actions of tort, depending upon the same state of facts, to recover for the overflowing of the plaintiff's land with water from the defendant's drain, and set back in the plaintiff's drain. There was evidence tending to show the following facts, which we assume to be true, for the purposes of this decision :

The plaintiff had gained a prescriptive right to discharge water from his land by a drain to a culvert running under Brigham street, the Boston and Albany railroad, and beyond ; the water being carried from the further side, of late years, by a box drain.

There is a system of drains under different highways, converging into one, under Brigham street, which also discharges through the same culvert. Some at least of these drains, including that through Brigham street, were built by the defendant town, and belonged to it, and the town had a right to discharge through the culvert. The box drain on the other side of the culvert was built by the town upon land of one Smith, under a lease or license granted for a nominal sum. The lease expired more than six years before the date of the suit ; but the box drain remained, and received the drainage as before, of which it was the necessary outlet. Smith did not object, but it seems had further negotiations with the town, which have resulted in the building of a new drain since these actions were brought.

The effect of the system of drainage was to bring down and to discharge through the culvert more water, and to discharge it more rapidly than otherwise would have been the case. Within six years before the date of the suits, the culvert had been filled up more or less, the box drain had failed at times to discharge the water freely, and the drain on the plaintiff's side of the culvert had become filled up. From some or all of these causes the plaintiff's land was flowed as alleged.

The plaintiff got verdicts under instructions allowing him to recover if the town had failed to use reasonable precautions in keeping the culverts free from obstructions, or had been guilty of negligence in maintaining a box drain of too small size, or in improperly constructing or negligently maintaining other drains that by themselves, or in connection with the culvert, made a faulty arrangement for disposing of the surface-water, and thus had caused the damage.

These, we believe, are the only facts needing mention. The plaintiff went to the jury on the eighth count alone, which made some of the defendant's requests for rulings immaterial, and we cannot adopt the defendant's construction of a further remark to the jury, upon which he bases an important part of his argument. The jury were told that, if they should find that not all the acts alleged in the eighth count operated to produce injury, but that some of them did, they could still find on that count in favor of the plaintiff. We think that this was not intended and could not have been understood to mean that any one act alleged would be sufficient, but simply reinforced what had been said already, and meant that less than all the acts alleged would be enough if the facts found by the jury satisfied the conditions of liability which had just been stated to them in detail.

If a private land-owner collects surface-water into a definite, artificial channel, and discharges it upon his neighbor's land, he is liable to an action. *White v. Chapin*, 12 Allen, 516, 520; *Curtis v. Railroad Co.*, 98 Mass. 428, 431; *Rathke v. Gardner*, 134 Mass. 14, 16; *Jackman v. Arlington Mills*, 137 Mass. 277, 283; *Cassidy v. Railroad Co.*, 141 Mass. 174, 179; 5 N. E. Rep'r, 142. And, when the defendant would be liable for a direct discharge, we apprehend that he would be liable also if the water was reflected upon the plaintiff's land by an obstacle to its direct course, when that obstacle was set up by the defendant, or was negligently allowed to remain when he ought to remove it. We think, also, that it would not matter that some water would reach the obstacle if the defendant's drain were not there, provided the drain brings down more than otherwise would come, and causes the flooding of the plaintiff's land by this excess. *Curtis v. Railroad Co.*, ubi supra. Again, the ordinary liability of a tort-feasor, who should stop a drain belonging to the plaintiff, would exist if he should

stop that drain by causing an otherwise lawful discharge of water into the outlet of the plaintiff's drain, the water thus discharged acting as a dam or obstacle to the plaintiff's water.

A town has no prerogative to flood the lands or to stop the drains of other land-owners without paying for it, and, if it does so without authority of law, it is liable to an action of tort. *Hill v. Boston*, 122 Mass. 344, 358. See *Hitchins v. Frostburg*, 68 Md. 100; 11 Atl. Rep'r, 826. It is true that a town is not liable for interrupting the flow of surface-water or for discharging or throwing surface-water upon adjoining land to a considerable extent, if not through a definite channel; but this is because no land-owner is liable for doing so. *Emery v. Lowell*, 104 Mass. 13, 16, 17; explaining *Barry v. Lowell*, 8 Allen, 128; and *Turner v. Dartmouth*, 13 Allen, 291. See *Gannon v. Hargadon*, 10 Allen, 106; *Franklin v. Fisk*, 13 Allen, 211; *Bates v. Smith*, 100 Mass. 181; *Morrill v. Hurley*, 120 Mass. 99. So a town is not liable to an action at common law for acts which are done under a statute, for instance in the repair of highways, or, it seems, in the construction of sewers, for which the statute provides a remedy by petition. *Emery v. Lowell*, *ubi supra*; explaining *Flagg v. Worcester*, 13 Gray, 601; *Manning v. Lowell*, 130 Mass. 21, 22; *Nealley v. Bradford*, 145 Mass. 561; 14 N. E. Rep'r, 652. See *Hull v. Westfield*, 133 Mass. 433; *Perry v. Worcester*, 6 Gray, 544; *Benjamin v. Wheeler*, 8 Gray, 409, and 15 Gray, 486.

But the case is different when a city or town has caused the plaintiff's land to be flowed in a way which would be actionable as against a private person, and which cannot be taken to have been contemplated by the statute under which it acts, or to have been paid for by the compensation allowed in respect of the original scheme. Thus, in the instance of sewers, it is settled that, if the plaintiff can prove that the injury was caused by the negligence of the city, either in the original construction of the sewer or in not keeping it free from obstructions, he may maintain an action against the city. *Emery v. Lowell*, 104 Mass. 13, 17; *Merrifield v. Worcester*, 110 Mass. 216, 221; *Murphy v. Lowell*, 124 Mass. 564; *Tindley v. Salem*, 137 Mass. 171, 172; *Stanchfield v. Newton*, 142 Mass. 110, 115; 7 N. E. Rep'r, 703; *Child v. Boston*, 4 Allen, 41, 52. So if, by a system of drains, a city artificially di-

verts surface-water from its natural course, and accumulates it upon the plaintiff's land in such quantities as to create a private nuisance, it may be liable to an action. *Manning v. Lowell*, 130 Mass. 21, 25; *Brayton v. Fall River*, 113 Mass. 218, 226. So, if it negligently fails to keep a culvert under a highway in such condition as not to obstruct a natural stream. *Parker v. Lowell*, 11 Gray, 353.

Emery v. Lowell, and the cases following it, have reinforced the distinction established in *Child v. Boston*, that while no action lies for a defect or want of sufficiency in the plan or system of drainage adopted in the exercise of a *quasi* judicial discretion under powers specially conferred by statute, the duty of keeping the common sewers in repair and free from obstructions, after they have been constructed and have become the property of the city under such authority, is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill. And there is no difference in these duties, whether the city has acquired the right to maintain the sewer by prescription, or has laid it under the statute. See *Gould v. Boston*, 120 Mass. 300, 306; *Phelps v. Mankato*, 23 Minn. 276, 279; *Bradbury v. Benton*, 69 Me. 194.

It was not intended to overrule or to modify the well-settled rules which we have stated, by the decision in *Kennison v. Beverly*, 146 Mass. 467; 16 N. E. Rep'r, 278. In that case the damage was caused by percolation from a catch-basin, which seems to have been incident only to an open gutter by the side of the highway. Assuming that there was evidence for the jury that there was such an artificial accumulation of waters as to fall within *White v. Chapin* and *Manning v. Lowell*, and that the trouble was due to negligence in construction rather than to the plan adopted, still it may be that the town was not liable in the absence of such evidence that it did the work as was found in *Deane v. Randolph*, 132 Mass. 475; *Waldron v. Haverhill*, 143 Mass. 582; 10 N. E. Rep'r, 481; *Doherty v. Braintree*, 148 Mass. 495, 497; 20 N. E. Rep'r, 106. It may be that defects in such a catch-basin are to be regarded as defects in surface drainage within the limits of the highway, and, therefore, as defects in the repair of the highway, the charge of which is committed by

statute to the highway surveyors. Highway surveyors, in the performance of their statutory duties, are held to be public officers, and not agents of the town, partly because of the town's want of control over them, and partly because the duty to repair the surface of highways is regarded as a public duty, from which the town derives no special advantage in its corporate capacity. *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570, 571; *Tindley v. Salem*, 137 Mass. 171, 174; *Blanchard v. Ayer*, 148 Mass. 174, 176; 19 N. E. Rep'r, 209. For these and perhaps other reasons it is held that towns are not liable for defects in such repair apart from statute, except in such cases as we have mentioned. *White v. Phillipston*, 10 Metc. 108, 110; *Bigelow v. Randolph*, 14 Gray, 541, 543; *Oliver v. Worcester*, 102 Mass. 489, 499; *Hill v. Boston*, 122 Mass. 344, 350. It seems that this irresponsibility is not confined to non-feasance, or to damage in the highway, to persons traveling there, but extends to cases of misfeasance (see *Walcott v. Swampscott*, *Tindley v. Salem*, *ubi supra*; *Manners v. Haverhill*, 135 Mass. 165); and to injury to persons or property outside of the highway. *Holman v. Townsend*, 13 Metc. 297; *Smith v. Dedham*, 8 Cush. 522. See *Benjamin v. Wheeler* and *Turner v. Dartmouth*, *ubi supra*; *Brailey v. Southborough*, 6 Cush. 141.

But it is settled by the cases which we have cited (*Emery v. Lowell*, etc.) that there is no such immunity with regard to sewers and main drains. These belong to the cities and towns by statute. Pub. St., chap. 50, § 1. And although the road commissioners, who are given authority to maintain them by the same section, are probably no more the agents of the town than highway surveyors, when exercising highway surveyors' duties (*Barney v. Lowell*, *ubi supra*; *Nealley v. Bradford*, 145 Mass. 561, 564; 14 N. E. Rep'r, 652), still, perhaps, they have not so exclusive an authority over sewers, and at all events the interest of the towns in the sewers is so distinct from that of the public at large that they are held, with reason, to the ordinary responsibilities of owners. See, further, *Oliver v. Worcester*, 102 Mass. 489, 500; *Haskell v. New Bedford*, 103 Mass. 208; *Hand v. Brookline*, 126 Mass. 324.

A further objection is taken by the defendant with regard to the box drain, that a tenant is not liable to third persons for dam-

age subsequently caused by a structure lawfully erected, and simply left by him upon his landlord's premises after the expiration of his lease. We certainly are not disposed to deny that proposition, when the circumstances are such that the tenant may be held to have abandoned the structure, and the landlord may be held to maintain it. *Blunt v. Aikin*, 15 Wend. 522; *Waggoner v. Jermaine*, 3 Denio, 306. See *Clifford v. Cotton Mills*, 146 Mass. 47, 49; 15 N. E. Rep'r, 84. But the tenant's liability will continue if he still maintains the structure, and, in a case like this, the question whether he does so or not will depend upon evidence which necessarily is slight, so far as it is drawn from subsequent acts. If the town abandoned the drain, natural causes would still carry water through it as before. If it maintained it, there was nothing in particular for the town to do, unless the drain should need repairs.

Perhaps the strongest evidence is found in the original transaction. Whether the leave to maintain the drain for five years given by Smith was a lease or a license, it is very plain that the limit of five years was fixed simply in order to preserve rights. Neither party can have expected that the drain was to be given up at the end of that time. The case is wholly different from the ordinary one of a tenant leaving a fixture. The same need which led to the agreement was likely to continue, and it would seem from the report adopted by the town that already the box drain was the necessary outlet of the system of drains and sewers belonging to the town heretofore mentioned. It is a fair inference that what should be done later was left to further negotiations, which seem from the vote of November 8, 1887, to have been had, and to have been successful. So far as the town added to its system of drains, it showed its intention to continue to use the box drain. It did continue in fact to discharge the water from that system through the box drain, and it negotiated with Smith, as we have said. There was ample evidence that the town used the box drain after the five years. What would be the liability for bringing down water against an obstacle not under the defendant's control, under circumstances otherwise like the present, we need not consider. Any insufficiency that there may have been in the drain seems to have been due to negligence in its construction or maintenance,

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not to a defect in the original plan. See *Hill v. Boston*, 122 Mass. 344, 375; *Perry v. Worcester*, 6 Gray, 544, 547.

Exceptions overruled.

1. **Surface-water — drains — municipal corporations.** — A natural embankment or barrier prevented the surface-water accumulating upon a large tract of land from flowing upon the plaintiff's premises. The defendant, as road commissioner, caused a drain to be cut through this embankment whereby a large amount of such water was caused to flow upon the plaintiff's lands over intermediate lands. The defendant was held liable for the damages. *Chapel v. Smith et al.* (Mich.), 45 N. W. Rep'r, 69. If a municipal corporation by the improvement of its streets causes surface-water to flow upon the lands of a proprietor where it was not accustomed to flow it will be liable. *Torrey v. City of Scranton* (Penn.), 19 Atl. Rep'r, 351; *Slack v. Lawrence Township* (N. J.), 19 Atl. Rep'r, 663. So it will be liable for a flooding caused by the negligent construction, management or obstruction of its sewers or drains. *Borough of Bethlehem v. Hans* (Penn.), 19 Atl. Rep'r, 437; *Anderson v. Mayor, etc., of Wilmington* (Del.), 19 Atl. Rep'r, 509; *Spangler v. San Francisco* (Cal.), 23 Pac. Rep'r, 1091. In Maine, where it was made the duty of the officers of towns by a general law, whenever they should deem it necessary for the public health or convenience, to construct public drains or sewers at the expense of the town, it was held the town was not liable for damages arising from negligence in the discharge of such duty. The decision is put on the ground that under this statute the officers act, not as agents of the town but of the sovereign authority of the state. *Bulger v. Inhabitants of Eden* (Me.), 19 Atl. Rep'r, 829. Where city acquired property on which was a private drain, it was held that it was not thereby bound to keep it in order for the benefit of one who had a right to use it. *Kosmak v. Mayor, etc., of New York* (N. Y.), 22 N. E. Rep'r, 945.

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(18 S. W. R. 270; 76 Tex. 373.)

1. **RAILROAD COMPANIES. SECOND RAILROAD ON RIGHT OF WAY. RIGHT TO COMPENSATION.** A railroad company cannot authorize a second company to construct a road on its right of way without additional compensation to the owner of the fee.

2. **POWER OF COMPANY TO CONVEY PART OF ITS RIGHT OF WAY.** A railroad company cannot convey a part of its right of way separate from its franchises, so as to authorize another company to construct a railroad thereon, without additional compensation.

3. **REMEDY. INJUNCTION.** In such case the second company will be restrained from constructing its road at the suit of the owner of the fee, until compensation has been made according to law.

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N. A. Stedman for appellant. *John D. Templeton* and *Hyde Jennings* for appellee.

COLLARD, J. The conveyance of plaintiff to the Texas and Pacific Railway Company of a right of way through her land in the city of Fort Worth vested in the company a perpetual easement for the purposes of right of way for its road. *Pierce Railr.* 130. The fee was not conveyed, but remained in the vendor. This company, having constructed its road on the right of way designated, and operating the same, transferred a part of its right of way, between its track and adjacent lots, to appellant, the Fort Worth and Rio Grande Railway Company; and the latter company has taken steps to build its road on this strip without compensation to Mrs. Jennings, whose adjacent lots will be injured or damaged by depreciation in value, if the road is built. Can this be done? The direct question has not been decided in this state; but kindred questions have been decided and discussed by the supreme court, a brief review of which will greatly aid us in deciding the question before us.

In the case of *Railroad Co. v. Odum*, 53 Tex. 353, Justice Gould, delivering the opinion, says: "The use of a street by a railroad, however, is not ordinarily inconsistent with its continued use for the common purpose of a street. The authorities are numerous and conclusive that such an addition to the uses of a street, the fee being in the public, if authorized by the legislature, gives the lot-owner no right to compensation, although his easement in the street be thereby partially impaired, and his lots rendered less valuable. The regulation or enlargement of the use of the street — the property of the state — by the legislature is not a taking of property, within the meaning of the constitution of 1869, although the lot-owner may thereby suffer incidental or consequential inconvenience or injury." The constitution of 1869 provided that "no person's property shall be taken or applied to public use without just compensation being made, unless by the consent of such person." Const. 1869, art. 1, § 14; 2 Pasch. Dig. 1101. The owner's rights in property are better guarded under the constitution of 1876. It declares that "no person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, unless by

consent of such person." Const. 1876, art. 1, § 17. Construing this language, it has been held that the term "property" as here used, means "not only the tangible thing owned, but also every right which accompanies ownership, and is its incident," and that, where the construction of a railroad inflicts an injury to such property not common to all other property in the same community by reason of the general fact of the existence of the railway, then such property may be said to be damaged, for which there must be compensation to the owner. *Railway Co. v. Fuller*, 63 Tex. 467. The court affirmed a judgment for damages in favor of the owner of lots and improvements on a street in which, by legislative authority, a railway company had built its road. In another, later case, decided at the Galveston term, 1889, Justice Gaines, commenting upon the language of the constitution, says: "Under the provisions of other constitutions, which merely provided compensation to the owner for property taken for public use, it had been a question whether or not one whose property was immediately and directly damaged by a public improvement, though no part of it was appropriated, could recover for such damages. * * * The insertion of the words 'damaged or destroyed' in the section [of the constitution] quoted was doubtless intended to obviate this question, and to afford protection to the owner of property by allowing him compensation when, by the construction of a public work, his property was directly damaged or destroyed, although no part of it was actually appropriated." *Railway Co. v. Meadows*, 73 Tex. 34; 11 S. W. Rep'r, 145.

It will now be seen that it is the law of this state that there need be no taking or actual appropriation of property to entitle the owner to damages on account of the construction of a railroad, or other public works adjacent thereto, but that it is sufficient if the property be thereby directly and specially damaged — depreciated in value — as a result not common to all such property in the same community; and it will also be seen that, where land has once been dedicated to the public as a highway, it cannot, even upon authority of the legislature, be appropriated to other public uses, so as to impose additional burdens upon other adjacent property, without adequate compensation to the owner. *Wood Ry. Law*, 721 et seq.; *Pierce Railr.* 232. The rights acquired by

condemnation of land for public purposes are similar to those ordinarily acquired by contract, unless otherwise stipulated in the deed. *Mills Em. Dom.*, §§ 110, 111; *Pierce Railr.* 132. The use of a street for a horse-car railway is not deemed a different use from that intended in its original dedication as a street. *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80.

The appellant contends, in this case, that a transfer of a part of its right of way by the Texas and Pacific Railway Company to the appellant did not contemplate a use different from that intended in the deed conveying to it the right of way, and consequently there could be no additional burden upon plaintiff's land by the building and running of defendant's road thereon. We cannot agree to this proposition. The deed of the right of way was to the Texas and Pacific Railway Company, granting it the right to use the same perpetually in operating its road. There is no doubt that a legal sale of the franchise and road would carry every thing appurtenant thereto — the right of way as well as the right to operate the road, and take tolls for freight and passengers; but it may be doubted that it can sever a part of the easement — an incident of the franchise — from the franchise itself, and convey the same to another company. It has been held by the supreme court of the United States that "the right of way could not be sold, on execution or otherwise, to a purchaser who did not own the franchise." *Railway Co. v. Doe*, 114 U. S. 341; 5 Sup. Ct. Rep'r, 869. The same doctrine is maintained in Ohio. *Platt v. Pennsylvania Co.*, 1 N. E. Rep'r, 420. But, where one company sold its entire right of way to another authorized to build and maintain a road between the same points, it was held that the owner of the fee was not injured or affected by the transfer, and that he could not call in question the capacity of the one company to sell, nor the other to purchase. *Orolley v. Railway Co.*, 16 N. W. Rep'r, 422. A railway company pledged its road and appurtenances to the state. The road was sold to satisfy the pledge, and Lane purchased one section of the road. Without deciding whether his purchase included any of the corporate franchises in conjunction with other purchases, it was held that a sale by him to the Junction Company passed title to the right of way, provided it constructed the road as required by the first corporation. *Railway Co. v. Ruggles*, 7

Ohio St. 1. Where depot grounds were deeded to a railway company, and, under sanction of the legislature, the property became vested in another company, it was held that the conditions of the original sale, to the use of the first company, was not violated. *Southard v. Railway Co.*, 26 N. J. Law, 13. A railway company made an assignment of its road and effects, which was adjudged valid by the courts. It was held that purchasers at the trustee's sale, who afterward incorporated, acquired all rights of the old company under deed to the right of way. *Pollard v. Maddox*, 28 Ala. 321. It has been held that the interest in land acquired by deed to the right of way, within the designated route, may be transferred to another railroad company, into which the original shall merge or consolidate with others by legislative authority. *Railway Co. v. Van Syckle*, 37 N. J. Law, 496; *Pierce Railr.* 130, 132, 133, 496, 497. The foregoing four cases are cited in *Pierce on Railroads* in support of the doctrine as stated in the text, "that a railway company * * * may convey, under authority of law, to another corporation, the interest in land which it has acquired by purchase for a right of way, to be used by the purchaser for the same purpose." And we find that none of the cases supports the proposition that a railway company can sell a part of its right of way to another company, so as to enable both companies to build and operate two roads on the same right of way. These authorities only go to the extent of holding that, where there is a legal sale of the road, its corporate rights, or when there is a merger of roads, or where one road is abandoned, and another company is authorized to construct the road on the same line, the right of way may pass by sale.

It may not be necessary, in the case before us, to decide whether a railway company owning the right of way may or may not, with the consent of all interested parties, sell a part of it without at the same time conveying its franchise. It may be only necessary for us to inquire if this can be done without the consent of adjoining land-owners, without compensation, by purchase or condemnation, where their lands are damaged specially, and not in common with the general public. Appellant cites the case of *Hatch v. Railroad Co.*, 18 Ohio St. 118, as sustaining its right to take the strip conveyed to it by the Texas and Pacific Railway Company, and construct its road thereon, without com

pensation to plaintiff for additional damages to her land. The land of plaintiff, in the case cited, was appropriated, under the right of eminent domain, for the purposes of a canal. The canal was made, and used for many years. A railway company, by amicable agreement, had the canal company's interest in the right of way condemned for its use as a railway without the consent of, or compensation to, the owner of adjoining land. The canal was abandoned, and the railroad constructed on the line. It was held that the easement was not abandoned by the canal company to the extent that it reverted to the original owner of the land; but it was also held that the owner was entitled "to recover the value of lands taken, not formerly taken by the original condemnation, and also a fair compensation for additional burdens and inconveniences, not common to the general public, as accrued to him, and his entire tract on which the easement was imposed, by reason of the change of uses." We do not see in what respect this case supports the position of appellant; but if it is supposed to do so, it was overruled in the later case of *Platt v. Pennsylvania Co.*, decided in 1885 by the same court, which is a case almost exactly in point with the one now under consideration. The Lake Shore Railroad Company had appropriated by condemnation a strip of ground one hundred feet wide by one thousand two hundred feet in length, and constructed its road on the western half, along which the road was operated. For a consideration of \$7,500, the company agreed with another railroad corporation to let it have twenty-five feet wide of the unused half upon which to construct and operate another road, and to so hold the same in perpetuity. The second road was built and operated on the surplus twenty-five feet, but no consideration was paid to the original owner, whose lot was thereby damaged. It was held that the land-owner, by the first appropriation (where more land was appropriated than was necessary, an easement, and not a fee, having passed) could not be subjected to the occupancy and burden upon such surplus of another common carrier. It was also held that the original owner could not have recovered the surplus from the first company, but had the right after its sale, to treat it as abandoned by the first company for its own uses, and that he was entitled to damages as upon an appropriation by the second company. It was also noted by the court that this holding was not

in conflict with the recognized right of a railway company to sell or lease its road with its franchises. 1 N. E. Rep'r, 420. The court also declared that plaintiff's case was supported by the cases of *Railway Co. v. Ruggles*, and *Hatch v. Railroad Co.* There was a dissenting opinion, holding that there was no change in the use of the easement, and, therefore, no additional servitude upon the owner's land; but we think the reasoning of the majority of the court is conclusive and just. It cannot be doubted that a right of way to one railroad is less onerous than when the same is granted to two, and it must be held that a grant of way to one does not authorize it to operate its road, and to convey a portion of the unused way to another company for the same purpose, without the consent of the owner of adjacent land damaged thereby, and without compensation to him for the damage so caused.

We think injunction to restrain the building of the road by defendant until the plaintiff was compensated, or until the way was properly appropriated under the law, was the proper remedy. *Pierce Railr.* 167, 168, 230.

Appellant contends that the court "erred in overruling its general demurrer to plaintiff's petition, because so much of said petition as alleges damage on account of the contemplated construction and operation of defendant's railway across Hill, Ochiltree, Ballinger and Center streets, to property not abutting on the right of way of the Texas and Pacific Railway Company, sets up a claim for damages too remote to furnish a basis for an action; and the injury, if any, is not special to plaintiff." If there was error in this part of plaintiff's petition, it being good in other respects, a general demurrer would not reach the defect.

The judgment of the court restrained defendant from building its road on the part of Texas and Pacific Railway Company's right of way running through any portion of blocks 12, 13, 25 and 29 of Jennings' south addition to the city of Fort Worth, and also that portion of the right of way occupying Hill and Center streets, at the intersection of said streets, between the center of said railway track and said block 29. The judgment awards and fixes no damages, but prohibits the building of the road without the consent of the plaintiff, his heirs or assigns, first had and obtained, or without proper appropriation of the same under the laws of

the state. Hill and Center streets intersect at the corner of block 29, where the right of way cuts off a corner of the block. The block abuts on the side of the right of way on which defendant proposes to build its road. We cannot say that there would be no damage to plaintiff by the construction of the road at this point, so causing additional obstruction in these streets. The question of the amount of damage must be settled by the parties, if they consent, or in the proceedings of condemnation, if defendant resort to that method of appropriation, as allowed by the judgment.

Our conclusion is, the judgment of the court ought to be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

Right of way — change of use. — Where a railroad company, pursuant to legislative authority, transferred its right of way to a municipal corporation for a street, it was held that the land reverted to the owner of the fee and that he could maintain ejectment therefor. *Heard v. Brooklyn*, 60 N. Y. 242; *String v. Brooklyn*, 68 N. Y. 1. So where an easement was taken for a canal and transferred to a railroad company. *Pittsburgh, etc., R. Co. v. Bruce*, 102 Penn. St. 23; *East Alabama Ry. Co. v. Visscher*, 114 U. S. 340; *La Fayette, etc., R. Co. v. Murdock*, 68 Ind. 137. But see *Hatch v. Cincinnati, etc., R. Co.*, 18 Ohio St. 92; *Chase v. Sutton Manf. Co.*, 4 Cush. 152.

KEMP v. WESTERN UNION TELEGRAPH COMPANY.

(44 N. W. R. 1064; — Neb. —.)

1. **TELEGRAPH COMPANIES. LIABILITY FOR ERROR IN TRANSMITTING MESSAGE.** One P. delivered a message to a telegraph company at its office at Papillion in this state, to be delivered to a person named at Kansas City, Missouri. The message as transmitted was incorrect, whereby P. lost a promised situation and sustained damages. Held, that the company was liable for the damages.

2. **STATUTE DEFINING LIABILITY AND ANNULING EXEMPTION CLAUSE.** Section 12 of the act relating to telegraph companies makes such company "liable for the non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ," etc., and provides that it shall not be exempted from any such liability by reason of any "clause, condition or agreement contained in its printed blanks."

3. Such requirements are reasonable, and are binding on all telegraph companies in the state.

4. MEASURE OF DAMAGES. Where a telegraph company undertakes to transmit a message correctly to another state, and fails to do so, it is liable for a breach of its contract, and the party injured may recover all the damages which he sustains by reason of such breach.

William V. Allen and John S. Robinson for plaintiff in error.
H. C. Brome for defendant in error.

MAXWELL, J. This action was brought by the plaintiff against the defendant in the district court of Madison county, to recover damages for the breach of an alleged contract. It is averred in the petition: "That on the 1st day of November, 1886, the said defendant owned, controlled and operated a line of telegraph wire from Papillion, in the state of Nebraska, to Kansas City, in the state of Missouri, with offices in each of said places in charge of duly-authorized agents, at which offices it held itself out to the public to receive and deliver telegraphic messages for hire; and on said date the plaintiff delivered to the defendant, at its office in said Papillion, for immediate transmission and delivery at Kansas City, Missouri, a message in the words and figures as follows, to-wit: "Nov. 1st, 1886. To J. C. Robertson, Coates House, Kansas City: Am on my way, Missouri Pacific and Kansas City. Arrive eight to-night. D. Kemp" — which the said defendant then received from the plaintiff, and agreed to promptly and correctly transmit and deliver to the said J. C. Robertson, at the Coates House, Kansas City, Mo., without delay. That the plaintiff then paid the defendant's duly-authorized agent the sum of sixty-five cents for such services, which was accepted by him as full compensation therefor. That at the said time this plaintiff had an engagement to meet said J. C. Robertson, the person to whom said message was sent, at the Coates House, Kansas City, Mo., at the hour of eight o'clock P. M. on said day, to contract with him, as general agent of the Texas Land and Cattle Company, to enter the service of said company on a salary. That, if plaintiff made said contract of employment, he was compelled to leave said Kansas City that evening at nine o'clock P. M., to enter upon the discharge of his duties as employe of said company; and if he did not reach said Kansas City by eight o'clock P. M., said Robertson was at liberty to hire another man for said situation. That said defendant so carelessly and negligently transmitted said message

that when it was delivered to said J. C. Robertson, at said Coates House, Kansas City, Mo., by the defendant, it read that the plaintiff would reach Kansas City at ten o'clock that night; making plaintiff's arrival there too late to transact said business. That said message was delivered in the condition last above stated; and, in consequence of its reading that plaintiff would arrive at Kansas City, Mo., at ten o'clock that night, the said J. C. Robertson employed another man for said Texas Land and Cattle Company, and the plaintiff was deprived of said employment, and the profit of said proposed contract. That the plaintiff was entirely without fault or neglect himself. That the plaintiff expended in money, in going to and returning from said Kansas City to see said Robertson, the sum of \$50, lost six days' time, of the value of \$30, and was deprived and prevented from making said contract of employment — all to his damage in the sum of \$200, which said sum is now due the plaintiff from the defendant, and wholly unpaid; and the plaintiff prays judgment against the said defendant for the sum \$200, with interest and costs of suit."

To this petition the defendant answered, in effect, that there was a condition printed on the blanks furnished by it on which to send messages, which provided that the company should not be liable for "mistakes or delays in the transmission of any un-repeated message whatever, happening from the negligence of its servants or otherwise, beyond the amount received for the sending of the same," etc., and fixing the liabilities "for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, not beyond fifty times the sum received for the transmission of the same, unless specially insured, nor, in any case, for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages," etc. Also, that the company will not be liable for damages in any case where the claim is not presented in writing within sixty days of the sending "of the message." On the trial of the cause, the court instructed the jury "that, under the law, and the agreed statement of facts herein, the plaintiff cannot recover beyond the amount paid for sending said message, which, it is agreed, is the sum of sixty-five cents." The jury returned a verdict as directed;

and, a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony tends to sustain the allegations of the petition. The point in the answer as to the limitation of time in which to bring the action is not referred to in the brief of either attorney, and, therefore, will not be noticed. Section 12 of chapter 89a of the Compiled Statutes provides that "any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law; and any such telegraphic company shall not be exempted from any such liability by reason of any clause, condition or agreement contained in its printed blanks." The defendant is a corporation existing in this state, and having offices at various points therein for the transaction of business; and that business is the transmission, for hire, of messages from points within the state to points on its line within or without the state. It is a common carrier of messages, the agent for the transmission of which is electricity. The agent used in the transmission, however, is not material. Suppose the defendant undertook to carry in wagons or other vehicles, messages or packages, and, under such employment, for the plaintiff, at Papillion, it received the message in question to be delivered at Kansas City, and it failed to deliver the same. It would thereby fail to perform its agreement, and would be liable for any damages which the party sending the message might thereby sustain. Why should not the same rule apply where the message is sent by electricity? The value of a message depends upon its correctness. If it is changed in any material part, it is not the same message as that delivered for transmission, and may materially affect the rights of both the person sending it and the person receiving it. Experience has shown that messages can be correctly transmitted from point to point both within and without the state, and, where due care is used, mistakes can be avoided. The rule seems to be that messages are correctly transmitted. The legislature of this state, recognizing these facts, in 1883 passed an act in regard to telegraph companies within the state, the twelfth section of which makes the company liable for the non-delivery of dispatches de-

livered to its care, "and for all mistakes in transmitting messages made by any person in its employ," etc., and declared that it "shall not be exempted from any such liability by reason of any clause, condition or agreement contained in its printed blanks." This is a reasonable requirement; and, as the telegraph company is bound by the law of the state as much as any inhabitant thereof, the statute in question becomes a part of the contract. That is, the telegraph company cannot ignore the law, and set itself up as superior to it, but must obey it, and transmit messages correctly, or be liable for its failure in that respect. This is conceded as to business in the state, but it is claimed that it does not apply to messages transmitted out of the state. The contract was made at Papillion, within this state; and there the defendant undertook to transmit correctly the message to Kansas City. It did not do so. The contract of the defendant, therefore, was broken, and the plaintiff thereby sustained damages. The place where part of the service was to be performed can make no difference. The contract was made here, and was to be in part performed in this state; and the defendant is liable for the breach thereof.

We are referred to the case of *Telegraph Co. v. Pendleton*, 7 Sup. Ct. Rep'r, 1126, as establishing a different rule. In that case, the statute of Indiana provided for a penalty of \$100 in certain cases of failure of a telegraph company to perform its duty. A message was transmitted from Indiana to a point in Iowa, and the company there failed to deliver the same. The action was brought to recover the penalty, and the United States supreme court held that it could not be enforced. In other words, that the penal laws of a state do not extend beyond its boundaries, and, therefore, on the failure of the company to perform its duty in Iowa, it did not become liable to the penal laws of Indiana. The above decision, no doubt, is correct; but it can have no application here. In the case at bar, the contract entered into by the defendant to transmit the plaintiff's message correctly, and for which it had received its pay, was broken. He has thereby sustained damages. These damages are the natural result of the breach of the contract, and are not penal in their nature. If recovered, they are merely to compensate the plaintiff for the injury sustained by him from the wrongful act of the defendant. Such

damages may be recovered. The precise question here involved was recently before the United States circuit court of this state in *Oppenheimer v. Telegraph Co.*, and Judge Dundy held that the company was liable; and we so hold.

The judgment of the district court is reversed and the cause remanded for further proceedings.

The other judges concur.

Liability of telegraph companies for negligence in regard to messages.—

A telegraph company will not be liable for a failure to deliver an oral message in the absence of evidence of its custom to do so. *Western Union Tel. Co. v. Dozier (Miss.)*, 7 So. Rep'r, 825. Plaintiff operated a saw-mill, and having broken their saw, engaged S., of the firm of G. & S., to order them one from St. Louis, by telegraph. S. wrote out a message to the C. & B. Hardware Co., of St. Louis, ordering them to ship a saw of the kind desired to G. & S., and gave the same with money to pay charges to a traveling salesman of the hardware company who, instead of using the message written by S., wrote a new one of similar import, signed his own name thereto and delivered it to the operator. The message was not delivered to the hardware company. It was held that the salesman was not acting as the agent of S. or plaintiffs in sending the message he did and that plaintiff, consequently, could not recover either the cost of sending the message or damages for the delay. *Elliott v. Western Union Tel. Co.*, 75 Tex. 18.

There can be no recovery against a telegraph company for a failure to deliver a message promptly unless such failure is due to the negligence of the company. *Thompson v. Western Union Tel. Co. (N. C.)*, 11 S. E. Rep'r, 269.

Plaintiff resided at H. with his wife. Her father was on his death bed at G. A relative of the family sent a message to plaintiff as follows: "Come on first train. Bring Ferdinand. His father very low." Ferdinand was a brother of the plaintiff's wife. By reason of delay in the delivery of the message plaintiff's wife did not reach her father until after his death. In a suit by plaintiff to recover for the mental suffering of his wife in not being with her father in his last moments, it was held that there could be no recovery for the reason that the message gave no intimation that it was for the benefit of the wife, and no explanation was made to the agent to whom it was delivered. The fact that the agent at H. knew that the plaintiff had a wife and that the message related to her father would make no difference. *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217. No question was made as to the right of the plaintiff to recover for the mental suffering of his wife. The same is true of the next preceding case in which the plaintiff sued, among other things, for the mental suffering of his wife.

S. brought suit against a telegraph company for negligence in delivering a message to R. as follows: "Meet me in Columbus Saturday night." In consequence of a failure to deliver the message R. was not in Columbus at the appointed time and plaintiff was obliged to travel a long distance to find him, and he sought to recover for loss of time, expense, exposure, etc. The

court held that there could be no recovery and dismissed the suit. *Western Union Tel. Co. v. Smith*, 76 Tex. 253.

Where a message, legibly written, is delivered to an operator, who called the agent at the receiving station and informed him of the number of words in the message, sent the message and received a reply indicating that the message had been received with the requisite number of words, but, in fact, the message as delivered by the receiving agent, omitted two words, it was held the company was guilty of gross negligence, and was liable for the damages resulting from the mistake, notwithstanding a stipulation in the blank used, that the company would not be liable for mistakes or delays in sending unrepeatable messages, except in case of gross negligence. *Western Union Tel. Co. v. Goodbar* (Miss.), 7 So. Rep'r, 214.

Plaintiff, in answer to a letter from C., telegraphed him to purchase property, and if the message had been promptly delivered he would have secured for \$3,000 property worth \$5,000. C. had written a similar letter to S., apparently residing at the same place as plaintiff, and S. had telegraphed C. to buy the same property. C. received the message of S. first, and the latter secured the property. The message of S. was delivered to the company for transmission an hour before the plaintiff's, but if plaintiff's message had been promptly delivered it would have reached C. before that of S. did in fact, although if both had been promptly delivered S. would have been ahead. It was held that if the delay of the plaintiff's message was the result of negligence, the company was liable for whatever loss the plaintiff sustained, and that the company could not excuse itself by showing that if S.'s message had been promptly delivered, which was not the fact, the plaintiff could not have secured the property. *Alexander v. Western Union Tel. Co.* (Miss.), 7 So. Rep'r, 280.

JEWETT V. OLSEN.

(39 Pac. R. 202; 18 Or. 419.)

1. **COMMON CARRIERS. LIABILITY FOR GOODS TAKEN ON LEGAL PROCESS.** When property is in the hands of a carrier for transportation, and, in the course of transit, is seized upon legal process, sued out against the owner of the property, and taken out of the carrier's possession, such property is placed in the custody of the law, and is so placed by a superior power, the power of the state, and excuses the carrier from liability for not delivering the goods.

2. **IN SUCH CASE THE CARRIER SHOULD NOTIFY THE OWNER.** When goods are taken out of the possession of the carrier by legal process he should give notice forthwith to the parties interested.

N. Steves for appellant. *T. B. Handley* for respondent.

LORD, J. The facts are that on the 18th day of November, 1887, one Northrob delivered at Tillamook, Oregon, a lot of ap-

ples to William Olsen, to be carried on the steamer *Rosa Olsen*, and delivered at Portland. The apples were not marked in any way, nor consigned to any one. On the 21st day of November, 1887, at Astoria, the constable came on board of the steamer with writs of attachment, and, by virtue of the same, levied upon the apples, and took them off the steamer, and sold them. These actions were against Northrob, and were for the purchase-price of said apples; and judgment was rendered in them on February 13, 1888. When the apples were seized under the writs of attachment, Northrob was at once notified, but remained passive, and made no defense. On the 13th day of February, 1888, the said Northrob sold said apples to one Jewett, who since has brought the present action against Olsen for failure to deliver the apples according to the contract of shipment made by Northrob with Olsen. It will be noted that the property, when delivered to the carrier, was not marked, nor consigned to any one, but was to be delivered at Portland, and presumably to Northrob, or to whomsoever he should authorize to receive them, by assignment or otherwise; that while such property was *in transitu* it was seized, under writs of attachment, at an intermediate port, and being perishable property, was sold, but that Northrob, who was then the owner of the apples, was immediately notified, in order that he might make his defense to the suits against him on which the property had been seized; and that he disregarded such notice, and refused or failed to make any defense in the premises, but two or three months subsequently sold the property to the plaintiff in this action. As a separate defense to the action, the proceedings, etc., in the writs of attachment were set up, and upon demurrer were sustained, as stating facts sufficient to constitute a defense, and the demurrer overruled, but during the trial, when offered in evidence in support thereof, were excluded by the court, and now constitute one of the assignments of error upon this appeal.

Upon the facts, the proceedings under which the goods were taken by the officer from the custody of the carrier were against Northrob, to whom the property belonged, and who subsequently sold them to the plaintiff in this action. It will be seen then, that the question we are to decide is whether a common carrier is excused from liability for not carrying and delivering the goods

when they are, without any fault or fraud on his part, seized by virtue of a legal process, and taken out of his possession. "That this will excuse the carrier," says one author, "is now almost universally conceded by the courts, in the absence of connivance or collusion on the carrier's part; and it seems to make no difference by or against whom the process is sued out, if it be valid." Hutch. Carr., § 396. "If this defense were not valid," says another learned author, in a note, "it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do." 2 Redf. Ry. *159. In the supreme court of the United States, where goods in the hands of a carrier had been attached by a third party in a suit brought by the consignees on a bill of lading, Mr. Justice Nelson said: "After the seizure of the goods by the sheriff under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been at the time in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant as carriers by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 290, 350, 453 of Drake Attachm. (2d ed.)." *Stiles v. Davis*, 1 Black, 101. See, also, *The Idaho*, 93 U. S. 575. In *Railway Co. v. Yohe*, 51 Ind. 184, the objection was taken by demurrer, and sustained by the court, that the answer did not state facts sufficient to constitute a defense; but it was on the ground of the want of an averment that the defendant gave immediate notice to the plaintiffs that the goods had been seized and taken out of his possession, which is duly alleged in the answer herein. In delivering the opinion of the court, Mr. Justice Downey said: "It is impossible

for the carrier to deliver the goods to the consignee when they have been seized by legal process, and taken out of his possession. The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process. After the seizure of the goods by the officer, by virtue of the process, they are in the custody of the law; and the carrier cannot comply with his contract without a resistance of the process, and a violation of law. The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process, or some other competent tribunal; and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done. As between the parties, the process would be no justification if the plaintiffs were the owners, and entitled to the possession of the goods. * * * The carrier is deprived of the possession of the property by a superior power, the power of the state — the *vis major* of the civil law — and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the ‘act of God, or the public enemy.’ In fact, it amounts to the same thing. The carrier is equally powerless in the grasp of either.” In *Railroad Co. v. Wilcox*, 48 Ga. 433, where goods were delivered to a common carrier for transportation, and were seized by legal process, and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings, it was held that the carrier had a legal right to presume they had abandoned the property as subject to legal process, which had seized it. And, further, that a seizure under the warrant of the goods while in the carrier’s possession would be a good excuse for their non-delivery. In *Van Winkle v. Steamship Co.*, 37 Barb. 122, a case where goods were seized on attachment, the court held: “If goods are taken from a bailee or carrier by authority of law, in any case coming within

these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper for a non-delivery." In *Bliven v. Railroad Co.*, 36 N. Y. 403, it was held that a common carrier is exonerated from his obligation to his bailor where the property of the latter is taken from him by legal process, and where the carrier immediately notifies him of such taking. *Burton v. Wilkinson*, 18 Vt. 186; *Edson v. Weston*, 7 Cow. 278.

Now, according to the facts, Northrob was the owner of the apples at the time they were seized, under writs of attachment, upon a debt or debts against him, and taken out of the possession of the defendant, and when he was notified of such attachment and seizure; and yet he disregarded the notice, and allowed the proceedings to go on without any defense thereto, and subsequently sold the property, and his claim thereto, to the plaintiff. At the time of the seizure there was no consignee to whom the goods were delivered; nor were they marked, nor any other person known to the carrier, other than Northrob, upon whose debts the property was seized, as owner, and whose subsequent conduct in selling it indicates that he was the recognized owner. When property is in the hands of a carrier for transportation, and in the course of transit is seized upon process sued out against the owner of the property, and taken out of the carrier's possession, such property is placed in the custody of the law, and is so placed by a superior power—the power of the state—and excuses the carrier from liability for a non-delivery.

It follows that the judgment must be reversed, and a new trial ordered.

WHITE v. CHICAGO, ST. L. & P. R. Co.

(33 N. E. R. 732; 122 Ind. 317.)

1. EMINENT DOMAIN. RAILROADS IN STREETS. ADDITIONAL TRACK. A railroad was located along a public street, the fee of which was in the abutting owners. Proceedings were had and damages assessed to the abutting owners. Afterward an additional track was constructed in the street on the side toward plaintiff's lot. It was held that by the condemnation proceedings the company acquired the right to construct such additional tracks as might be necessary for their business without any further liability to the abutting owners.

2. DAMAGES PRESUMED TO BE INCLUDED IN THE AWARD. Where part of

a tract of land is taken for a railroad, the award is presumed to include all damages which will result from the construction and operation of the road in a proper manner.

Fausler & Shaffrey and *Nelson & Myers* for appellant. *N. O. Ross* and *George E. Ross* for appellee.

OLDS, J. The appellee is the owner of a railroad running on and over Canal street, in the city of Logansport. Said street is sixty feet wide, and the main track of said railroad, as originally built and ever since maintained, is located along the center of said street. Appellant is the owner of a lot abutting and fronting on the south side of said street, upon which is situated a dwelling-house in which she resides, and her only means of ingress and egress to and from said lot is from said street. After the construction of a main track of said railroad, the defendant company, without any permission of the owner of said lot, and without any proceedings to condemn the street for the use of said company, except the original proceedings, when the road was constructed, built a second track, or side track, along said street, along and upon the south half of said street, south of the main track in front of the said plaintiff's lot and residence, and has for several years maintained and used the same. The appellant brings this action for damages sustained by reason of the building and using of said extra or side track upon the south half of said street in front of her lot. She alleges the facts in her complaint, and asks for damages sustained. Issues were joined, and, a trial by the court, without the intervention of a jury, resulted in a finding and judgment in favor of the defendant below, the appellee. Upon proper request, the court found the facts specially, and stated its conclusions of law. The appellant excepts to the conclusions of law as stated by the court, also moves for judgment in her favor on the facts found; which motion is overruled, and the ruling assigned as error. The findings of fact and conclusions of law, as stated by the court, are as follows:

"Finding of facts.—The court, having been requested by the parties to find the facts, with the conclusions of law thereon, with the view of excepting to the decision of the court upon the questions of law involved in the trial, finds the following facts, to-wit: First, The court finds that the plaintiff is the owner in

fee-simple of lot four, of James A. Taylor's addition to the city of Logansport, Cass county, Ind.; that she acquired title thereto on the 4th day of January, 1870, remotely through said Taylor, and has had possession thereof ever since, and up to the present time, and that said lot is a part of two lots on the south side of Canal street, and opposite lots eighteen and nineteen, and was owned by said Taylor, in fee-simple, during the months of June and July, 1859, and until after January, 1863. Second, That on the 9th day of June, 1859, the Toledo, Logansport and Burlington Railroad Company filed in the office of the clerk of the Cass circuit court the instrument of appropriation, to-wit: 'To all whom it may concern — Take notice: The Toledo, Logansport and Burlington Railroad Company, a corporation duly organized in pursuance of the General Railroad Law of the state of Indiana, approved May 11, 1852, for the purpose of constructing, maintaining and operating a railroad within the state of Indiana, agreeable to their articles of association, has located the line and route of their said railroad over and across the lands and premises hereinafter mentioned and described, and that said company intends to, and does hereby, under and pursuant to the provisions of law, appropriate the rights, interests, lands and premises hereinafter described, for the purpose of constructing, operating and maintaining their said railroad. Said company not having agreed with the owners of the lands touching the damages which may be sustained by them by reason of the construction of the same, or for the lands, interests and real estate thereby appropriated as aforesaid, to the end that appraisers may be appointed to assess said damages, if any may be by them sustained, does hereby file these articles of appropriation, describing the interests and rights to be appropriated, to-wit: [describing certain lands]. Also in and through Canal street, in the city of Logansport, Cass county, Indiana, so far as said company may be legally liable for damages to the owners of lots, and parts of lots, on either side of said street, who are as follows, to-wit: James A. Taylor, as the owner of two lots on the south side of Canal street, opposite lots eighteen and nineteen, such appropriation to include the right of said company to take materials for the construction and repair of said railroad at any point within fifty feet of the center of said railroad, except along said street, with the

right of way over said tracts of land sufficient to enable said company to construct and repair said road, and the right to conduct water by aqueducts, and the right to make drains, and to have and hold said rights, interests and privileges to the use of said company, so long as the same shall be required for the uses and purposes of said road, in as full and ample and perfect a manner as may be required for that purpose, reference being had to the map and surveys of the engineers of said company showing the line, route and location of said railroad, and to the certificate of location attached thereto, and being part thereof, filed in the office of the clerk of the Cass circuit court, for a more particular description of the said tracts and parcels of land so taken and rights and interests so appropriated, by said company for the purposes aforesaid. In witness whereof the said company has caused these presents to be signed by their president this 21st day of June, 1859. D. M. Dunn, president.' A copy of the map and survey of the line and route of the location of said railroad is attached hereto as a part of said instrument of appropriation, and marked 'A.' That on the 29th day of June, 1859, the foregoing instrument of appropriation was served on James A. Taylor, by the delivery to him of a copy thereof; and on the 1st day of July, 1859, the judge of the court of common pleas, in vacation, appointed three disinterested freeholders of said county appraisers to assess the damages that said Taylor might sustain by reason of said appropriation. That afterward, on the 4th day of July, 1859, said appraisers made their appraisal, and filed it in the office of the clerk of said county, in which they gave and assessed in favor of said Taylor, as the damage he would sustain, as the owner of said lots, by such appropriation, the sum of one hundred dollars, which sum was afterward on the 10th day of October, 1859, paid to and accepted by him as and for his said damage. Third. That during the years 1859 and 1860 said Toledo, Logansport and Burlington Railroad Company completed said railroad, by building a single track along Canal street, near the center of the street, so that cars could run over the same, and that it has been used and operated as a railroad ever since, and is now so used, and that the defendant is, and has been since April 2, 1883, the owner of and operating the same, as the remote vendee of said Toledo, Logansport and

Burlington Railroad Company. Fourth. That the plat hereto attached, marked 'B,' is a correct representation of said railroad tracks of the defendant as used and operated on the 2d day of April, 1883, when it first commenced operating said road, and as it has remained ever since, through Canal street, in front of the plaintiff's property; that the lot marked '4,' on the south side of Canal street, represents the plaintiff's lot, and so much of it as is marked with diagonal lines represents her dwelling thereon; that the north red line represents the original main track of said railroad, the south rail of which is twenty-nine feet north of the north line of the plaintiff's lot, and said Canal street is sixty-six feet wide; that the south red line represents a side track that was put in and constructed where it now is in the year 1871, by the remote grantors of the defendant, without other or further condemnation or appropriation proceedings than hereinbefore mentioned, and without the consent of the plaintiff, and she at the time made objections to the men engaged in the work, and it was extended from Third street to a point nearly opposite the east line of lot number twenty-one, as marked on said plat, the east end being designated by a small black mark or line at right angles with the red line; that in the year 1882, and before this defendant owned or had possession of said road, said south track was extended to the shops connected with said road, a distance of about one mile, and since that time has been used as a track for trains going east, and the north track for trains going west; that the end of the ties are fourteen feet, and the south rail of the south track fifteen feet and two inches, north of the north line of the plaintiff's lot, and that the distance between the center lines of the north and south tracks, above mentioned, is twelve feet and two inches. Fifth, That at the time said side track was constructed, in the year 1871, the Columbus, Chicago and Indiana Central Railway Company was the owner of said railroad; that, under an order and decree of foreclosure of the circuit court of the United States for the district of Indiana, said railroad, with all things thereto appertaining, was sold, and on the 21st day of February, 1883, was conveyed, to William L. Scott, Charles J. Osborn and John S. Kennedy, who, on the 17th day of March of the same year, conveyed the same to the defendant, and that on the 2d day of April, 1883, the defendant took possession of said

railroad, and has operated it ever since, and has maintained, kept up, and used said side track ever since. Sixth. That the rails and ties of said side track are, and have been ever since the 2d day of April, 1883, from six to seven inches above the grade and surface of said Canal street, in front of plaintiff's property, and that by reason of the construction and maintenance of said side track the plaintiff has been interrupted in the use of said street, and access to her property through and across said street, with any kind of wheeled vehicles, has been made much more difficult and dangerous; that ever since the construction of said railroad, or soon thereafter, telegraph poles were placed by the Western Union Telegraph Company, and maintained, along the outer edge of the sidewalk that passes in front of and adjoining the plaintiff's property, and south of said second track on that side of the street, but none of the poles were placed in front of the plaintiff's premises on which the wires were held that were used in the operation of said railroad by the several companies operating said road ever since its completion, in the year 1860. Seventh. That the rental value of plaintiff's property, by reason of the foregoing facts, has been reduced in value since the 2d day of April, 1883, up to the 17th day of August, 1887, in the sum of three hundred and fifteen dollars, and she has sustained damages in the said sum of three hundred and fifteen dollars.

"The court, being sufficiently advised, does now conclude the law to be, on the facts found in this cause, as follows: First. The plaintiff is not entitled to maintain an action for damages for a trespass. Her remedy, if any she has, is in an action for compensation, by way of damages, for the real estate occupied and used by the defendant for railroad purposes, or by having the damages assessed under the statutes relating to the assessment of damages for property taken under the right of eminent domain. She cannot maintain an action either for trespass, or in ejectment, or for an injunction. Second. I find, for the defendant, that it is entitled to recover its costs."

The map referred to as "Exhibit A" in the finding, is a map of the road as it was located for a distance beyond the city limits on either side, having a line designating the center of the right of way or road which ran along Canal street on the outside of the platted-in lots of the city; two lines, one on each side of the

center, showing the width of said right of way, also showing the grades at various points. The map contains no statement of fact as to whether there was to be one track or a number of tracks, except that there was but the one track platted. The map marked "B" indicates the location of the lot, the railroad, and shows the main track and side track, and their relation and proximity to the lot owned by the appellant. The findings of fact show that there were proceedings instituted to condemn the land to be used for the construction and building of the railroad, and that damages were assessed for the injury to the lot in question, then owned by one Taylor, and afterward purchased, and now owned by the appellant. The primary and material question to be determined is as to whether the appellant has any right of action for damages accruing to her on account of the location and maintenance of the extra track or switch.

The statute in regard to acquiring the right of way for the construction of railroads was in force, as it now is, at the time the railroad operated by the appellee was constructed. We quote a part of section 3903, defining the powers, rights and privileges of railroad companies. It provides: "Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions, expressed in the special powers following." The third specification grants the right "to purchase, and by voluntary grants and donations, receive and take, and by its officers, engineers, surveyors and agents enter upon, take possession of, hold and use all such lands, and real estate, and other property as may be necessary for the construction and maintenance of its railroad stations, depots and other accommodations necessary to accomplish the objects for which the corporation is created, but not until the compensation to be made therefor," etc. The fourth specification grants the right "to lay out its road, not exceeding six rods wide, and to construct the same; and, for the purpose of cuttings, embankments and procuring stone and gravel, it may take as much more land, within the limits of its charter, in the manner provided hereinafter, as may be necessary for the proper construction and security of the road. Fifth, to construct its road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner

as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair the usefulness, or injure its franchise. Section 3907 provides for the appropriation of land for the use of the company.

It is well settled that a street is a highway, and that the fee to the street is in the adjacent land-owner, subject to an easement in the public (*Cox v. Railroad Co.*, 48 Ind. 178; *Indianapolis v. Croas*, 7 Ind. 9), and that damages may be properly assessed in favor of the lot-owner for the use of a street by a railroad company; and there can be no doubt but that the company may, by proper proceedings, have the damages assessed to an adjacent lot-owner, when the street is appropriated for the purpose of constructing a railroad along and over the street adjacent to the lot. The lot-owner has an interest in land to be appropriated or used, and the company may have the damages assessed the same as if the appropriation was of a portion of the lot; and this proposition is not controverted by counsel in this case. The finding of facts shows that an application was made, in pursuance with the statute, to appropriate the property, and due notice given, and the damages to the lot in question assessed and paid by the company, and accepted by the owner. The question is presented as to what rights the railroad company making such appropriation acquired in the street. The statute authorizes the location of a railroad upon a street. It likewise authorizes the appropriation of a right of way for the construction of a railroad six rods in width, and as much land in addition thereto as may be necessary for the construction, and proper use and operation, of the railroad. The application for appropriation in this case states that: "Such appropriation to include the right of said company to take materials for such construction and repair of said railroad at any point within fifty feet of the center of said railroad, except along said street, with the right of way over said tracts of land, sufficient to enable said company to construct and repair said road, and the right to conduct water by aqueducts; and the right to make drains, and to have and to hold said rights, interests and privileges to the use of said company, so long as the same shall be required for the use and purposes of said road, in as full and

ample and perfect a manner as may be required for that purpose" — and under this application damages resulting therefrom to the lot in question were assessed in favor of the owner, and were by him accepted. By this appropriation the railroad company obtained the right to lay their track upon and use the street in question for the purpose of constructing and operating their railroad in as full and perfect a manner as might be required for the purpose of operating the road.

In treating of the assessment of damages, in 2 Wood Ry. Law, pp. 897, 898, § 256, it is said: "The presumption is that every injury which, in judgment of law, would result to the other adjacent property of the owner from taking a part of his land for the construction of the road, and from the use of it, in a proper manner, when constructed, was foreseen by the appraisers, and included in their first estimate. The award made by the statutory tribunal is exhaustive; and the land-owner cannot maintain an action for damages which should have been, but were not, assessed and allowed in that proceeding, even though he claimed them then, and they were erroneously disallowed. His remedy for such error is by steps to review the award. Where the appraisal of land damages was reduced below what it otherwise would have been by the representations of the agents of the company that the road would be constructed in a particular manner, made at the time of the appraisal to the commissioners, and such representations were not fulfilled in the actual construction of the road, whereby the plaintiff sustained serious loss and injury, it was held that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained for constructing the railway contrary to such representations, provided it was done in a prudent and proper manner." In the case of *Railway Co. v. Smith*, 111 Ill. 363, it was held that "where a person conveys a right of way over his land it will be conclusively presumed that all the damages to the balance of the land, past, present and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a consideration would be presumed to embrace," and that a grant of a right of way "for all uses and purposes [of the company], or in any way connected with the construction, preservation occupation and enjoyment of said railroad," is broad enough to

embrace all uses for railroad purposes, however much increased, and by any other companies authorized by law. It is further held that, when a right of way is condemned for public use over a tract of land, the owner will be entitled to compensation not only for the value of the land taken, but also for all damages to the residue of the tract, past, present and future, which the public use may thereafter reasonably produce. In *Babcock v. Railroad Corp.*, 9 Metc. 553, it is held that a grant of power to accomplish any particular enterprise, especially one of a public nature, carries with it authority to do all that is necessary to effect the principal object. In *Pierce Railr.* 177, it is said: "The final award is a bar to an action for any injury which the appraisers could have legally estimated, irrespective of their action upon the claims for injury, or even their knowledge or ignorance of its existence. They are conclusively presumed to have performed their duty, except in a direct proceeding to set aside the award or on appeal." The doctrine is well settled by the decisions of our own court that a claim for damages cannot be reviewed, and when damages are assessed for an injury to property resulting from a permanent improvement, or taken for public use, it bars all actions for future damages. See *City of Lafayette v. Nagle*, 113 Ind. 425; 15 N. E. Rep'r, 1, and authorities cited in that case.

In appropriation of a right of way, or the location of a railroad along, upon and over a street or highway, the location and appropriation is made with a view of future use and occupancy by the railroad company to the full extent and purpose as the future operation and business of the company may demand. It gives to the company, as against the property-owners affected thereby, the right to use such right of way or street or highway, upon which the road is located, a full and complete right to use the same, for railroad purposes, in as full and ample a manner as the necessity of the company may demand. It is manifest, when the road is located, that it cannot be successfully operated with but one line of track, without any turn-outs or switches. It is likewise evident that, with the future development and improvement of the country along the line of the road, the business of the road will increase, and with such increase of business a necessity will arise for additional tracks and switches. When proceedings

to appropriate a right of way, and for the assessment of damages sustained by property-owners along the right of way, or abutting upon a street upon which the proposed road is to be located, are resorted to, future necessity, as well as the present needs of the company, are conclusively presumed to be taken into consideration, and that when damages are assessed it includes all damages resulting from the construction, and from all necessary and proper use of the right of way, road, street or highway by the railroad company for railroad purposes. This would not include damages resulting from the negligent use of a street or highway by the company, or for an unnecessary change of an established grade of a street, or negligent or unnecessary obstruction of the same; but it does not include all damages resulting to the property-owner from the legitimate and necessary use of the same for railroad purposes, including the right to lay necessary additional tracks or side tracks. That this is the true rule to apply in such cases, we think there can be no doubt; and such rule is, as we believe, supported by the weight of authority. It was certainly not contemplated that, after a company had condemned a right of way for railroad purposes, in no way limiting the use to which the same should be put in the future, but stipulating in the instrument of appropriation that it was to be in as full and ample and perfect a manner as may be required for railroad purposes, it is necessary, as often as the future business and necessity of the company demands an additional switch, or even an additional track from one station to another, for the company to file an additional instrument of appropriation, and have the additional damages assessed resulting to the property abutting the right of way or street along where such additional track or switch is to be located by reason of its construction; and we think there can be no difference between the rights of a land-owner abutting on the right of way, and abutting on the street, in cases where damages have been assessed. In such case, damages have been assessed for the necessary use of the same for railroad purposes.

We have not set out the complaint in full in this case. We do not deem it necessary. The complaint is upon the theory that the appellant is entitled to damages by reason of the location of the side track or switch along and upon said street, on the ground that it is an additional burden, not included in the original appro-

priation; and, taking the theory we do of the law, there can be no recovery on such ground. The facts found show the location of the road, instruments of appropriation filed, and damages assessed for the injury to the lot in question, and paid and accepted by the then owner; that the appellee has succeeded to all the rights of the original owners of the road. The court rendered a proper judgment on the facts found; and a judgment will not be reversed for error in a conclusion of law stated, if a proper judgment is rendered on the facts found, as such error is harmless.

Counsel have discussed at length the remedy in case the side track constituted an additional burden, for which the owner ought to recover damage; but, as we hold it constitutes no additional burden for which damages may be recovered, we are not called upon to decide as to what is the proper remedy. There being no wrong, there is no remedy. If the complaint alleged the unlawful construction and maintenance of the side track in an improper manner, unnecessarily obstructing the street, it would present a different question. The court having rendered a proper judgment on the facts found, there is no error for which the judgment should be reversed.

Judgment affirmed with costs.

ON PETITION FOR REHEARING.

OLDS, J. Counsel for appellant insist the court misconstrued the theory of the complaint. In this we think they are mistaken. The complaint charges that "upon the 2d day of April, 1883, and ever since, the defendant has wrongfully, unlawfully and without right, kept up and maintained a second additional track in the center of the south half of said Canal street," etc. Then it alleges that a portion of the ties, and all of the rails, are above ground, which second railroad track has been so kept up and maintained, etc. Then it alleges the use of the track for running trains of cars, and standing engines, upon it, obstructing the street, making it impossible to cross the street for many hours without crawling under the cars so wrongfully kept upon the track; that by reason of the running of engines and trains of cars wrongfully, as aforesaid, upon said second track, so wrongfully maintained, as aforesaid, by the defendant, the plaintiff's said

house is rendered grimy and dirty by the dust raised by the defendant's engines and cars, and the smoke which exhales from said engines penetrates into her said house, to her great damage, etc. There is no allegation in the complaint that the running of engines and cars upon said second track, and allowing them to stand upon the same, are not within the ordinary and necessary use of the road. There is no allegation that the second track was improperly constructed. Taking the complaint as a whole, there is but one construction which can reasonably be placed upon it, and that is the one we placed upon it in the original opinion; that it proceeds upon the theory that the plaintiff is entitled to damages by reason of the location of the second track along and upon said street, on the grounds that it is an additional burden, not included within the original appropriation, and that the second track is unlawfully placed upon the street; and it does not proceed upon the theory that the second track is lawfully upon the street, but improperly constructed, and an unlawful use made of the track. Besides, the case was argued upon the same theory on which it was decided. Counsel for appellant, in their original brief, stating the theory of the case, say: "That the appellee had for a number of years rightfully maintained a single track of its road through the center of said street; that ever since the year 1883 the appellee has unlawfully, and without right, kept and maintained an additional track in the center of the south half of said street, in front of and adjacent to the plaintiff's lot and dwelling-house." It is further stated in the brief that the first question presented is, "can the plaintiff maintain this action for damages caused by the defendant in using the entire south side of the street in front of plaintiff's lot, with a second or additional railroad track, without further proceedings to have her damages assessed?" "Does the fact that the appellee or its grantors caused damages to be assessed for the right to lay and maintain a single track along the center of the street give it the right to lay additional tracks?" These statements from the original brief of counsel show conclusively that counsel took the same theory of the question presented in the case as did the court in rendering its decision; and it comes in bad grace now for counsel to change base, and insist upon another theory on petition for rehearing, after a suggestion in the decision that the complaint might have

been so formed as to present a different question. It is suggested that we ought to decide upon the question of limitation. Having decided that the plaintiff cannot maintain this action at all, there is no question of limitation to be passed upon. Counsel, in effect, ask the court to pass upon the question as to when some other form of an action would be barred by the statute of limitation. This we cannot do.

The petition for rehearing is overruled.

Railroads in streets — recent decisions. The general subject of railroads in streets is discussed in the note to *McQuaid v. Portland, etc., Ry. Co.*, 1 Am. R. R. & Corp. Rep. 34, 47. When the owner of a lot consents to the construction of a railroad on the street in front of it and the road is built and afterward the lot is sold, there is a waiver of damages by reason of the road which is binding upon the purchaser. *Merchants' Union Barb-Wire Co. v. Chicago, etc., R. Co.* (Iowa), 44 N. W. Rep'r, 900. A bill will not lie to enjoin the construction and use of a railroad upon the street in front of the plaintiff's lot, unless such construction and use will specially interfere with the plaintiff's ingress and egress to and from his premises. *Paquet v. Mt. Tabor Street R. Co.* (Or.), 22 Pac. Rep'r, 806. When a statutory authority to lay down a railroad in a street is conditioned upon the payment of damages to abutting property, an injunction will lie to prevent the construction of the road before the payment of the damages, although both the property-owner and the company have the initiative in proceedings to have the damages assessed. *Georgia, etc., R. Co. v. Ray*, 11 S. E. Rep'r, 352. Where a company was authorized to construct its road upon a city street, and was required to construct an embankment on an intersecting street so as to carry the latter over the track, it was held that, as the city could have constructed the embankment without liability to abutting property, it could authorize the railroad to do so with like exemption. *Ravenstein v. New York, etc., R. Co.*, 120 N. Y. 661; 24 N. E. Rep'r, 1020. In *Fogg v. Nevada, etc., Ry. Co.*, 23 Pac. Rep'r, 840, it was held that a railroad running along the middle of a street eighty feet wide and raised six or eight inches above its surface, could not be abated as a nuisance. It was also held in the same case that the owners of separate lots on the street could not join in a bill to restrain the alleged nuisance, but a contrary view was held in *Taylor v. Bay City Street Ry. Co.*, 45 N. W. Rep'r, 835. A bill to enjoin a railroad in a street and to recover damages to the plaintiff's property is not multifarious, as the damages are an incident to the equitable relief. *Shepard v. Manhattan Ry. Co.*, 117 N. Y. 442; 23 N. E. Rep'r, 80.

SELEY V. SOUTHERN PACIFIC RY. CO.

(23 Pac. R. 751;— Utah —.)

1. RAILROAD COMPANIES. NEGLIGENCE. OPEN FROG. Plaintiff's intestate, a conductor of a freight train on the defendant's road, while attempting to make a coupling, got his foot caught in an open frog and was run over and

killed. It appeared that a device known as a "safety block" was in use and well known, and would have prevented the accident. Held, that the defendant was negligent in not using it.

2. DUTIES OF CONDUCTOR. It appeared that it was the duty of the conductor to get his train through on time, and that he assisted in switching and making couplings if necessary. Two brakemen had attempted to make the coupling and failed. The deceased then made the attempt. Held, that he was not acting outside of his duties as conductor.

3. CONTRIBUTORY NEGLIGENCE. KNOWLEDGE OF DEFECT. There was evidence tending to show that the deceased knew or had reason to believe that the frog in question was open. Held, that whether he was guilty of negligence in not having it in mind at the particular time and place of the accident was a question of fact for the jury.

Marshall & Royle for appellant. *E. M. Allison, Jr.*, and *Kimball & White* for respondent.

ZANE, C. J. This action was instituted by the administratrix of the estate of the late William H. Seley, to recover damages to his widow and children in consequence of his death, occasioned, as alleged, by the negligence of the appellant. The deceased was employed by the appellant as a conductor on its freight train, and while endeavoring to make a coupling at Wells, a station in Nevada, one of his feet became fastened in an open frog, and he was run over by a car and killed.

It appears from the evidence that blocked or cast-iron frogs are used in many tracks. In these the point of the space between the rails is filled with wood or other material, so that the foot will not be held. This block is a simple device, practicable and inexpensive, and prevents the danger. It is called a "safety block." There were six or seven tracks at Wells, and three frogs, and at such a place couplings are required to be made promptly, at all times of the day and night, and the exclusive attention is necessarily directed to the coupling. The individual, at such times, cannot act with deliberation, and his eye, as well as his attention, is necessarily drawn to the coupling. Open frogs, in which the foot is liable to be caught, and from which a release is difficult without more time than a man has when making a coupling, necessarily add to his hazards. The safety block has been in use for years past. It is a simple device for the protection of employes engaged in a very hazardous employment. It is no longer an experiment. It is said that the employer is not bound to employ

the latest improvements in machinery ; that he is only required to see the instrumentalities he does use are safe and suitable. An old machine or device may have been considered safe and suitable, as compared with old machines or devices, but, as compared with newer and more perfect ones, it may not be considered safe or suitable; for the human mind is ever engaged with new inventions, and human ingenuity, with wider experience, additional skill and with ceaseless energy, removes old impediments and dangers in perfecting the old, as well as by inventing the new. While a railway company is not required to experiment with novel inventions alleged to be safer and more suitable, yet, when experience has demonstrated that their use does remove hazards, and preserves the lives of their employes engaged in dangerous employments, prudence, as well as humanity, demands that such new agencies shall be used. Such companies have no right to continue to employ such dangerous and destructive agencies as wound and kill their employes, when safer and better ones are in use. We are of the opinion that the appellant was guilty of negligence in using the open frog.

It is said that the defendant did not insure the deceased against injury from the dangerous agencies which it necessarily employed, and that he assumed the ordinary risks incident to his employment. While this is so, the deceased did not assume the risks from defendant's negligence. Ordinary risks are such as remain after the employer has used all reasonable means to prevent them. The ordinary risks of an employment differ from the risks from the employer's negligence. The injuries resulting to the employe from the ordinary risks of his employment he must bear, but those that come to him alone from the employer's negligence the latter must bear. In not using the safety block, the appellant neglected a reasonable means to prevent injury to its employes in making couplings, and if the deceased, without his fault, lost his life from that neglect, the defendant must pay his wife and children their loss; the defendant must bear it.

It is claimed that the deceased, as conductor, was not authorized to couple cars, and that, therefore, the defendant is not liable. It appears from the evidence that the conductor of a freight train is expected to use all reasonable diligence to get his train through on time, and that in so doing he assists in switching and

making couplings, if he deems it necessary. His duties are somewhat general. It appears from the evidence that Seley's train had come into the station late, and that one of the brakemen had made two attempts to couple a car on, and had failed, and that the other brakeman had failed once; that five or ten minutes had been lost in these attempts; and that the deceased, who had been conductor about seven years, and brakeman a number of years before that, then said he believed he could make it, and then made the effort. Under these circumstances, as a diligent and faithful freight conductor, we think he was authorized by the terms of his employment to make the effort. To have stood by under such circumstances, without bringing to bear his experience and skill, might have been regarded as an indication of indifference, and a lack of zeal in his employer's business.

It is also said that the deceased ought to have informed his employer of the open frogs in use in its track, and that they were dangerous, and to have exacted a promise to repair in a reasonable time; and without such a promise, or in case of a failure to comply with it if made, he should have left the appellant's employ. No notice was necessary, because the deceased had no right to assume that his employer was ignorant of the open frogs in its track. He must have known that the company had failed to employ the safety block for fifteen or twenty years. He had been brakeman and conductor on its road for the greater part of that time. Nor do we think that the deceased assumed the risk from the open frog by entering the defendant's employ with it in use, or by continuing in such employ after he knew the use of the safety block would remove its perils. Imminent danger from a defect in a machine or other instrumentalities, which could be remedied or removed by reasonable and practicable means, is not like those dangers that are less threatening, and which a reasonable man might think he could avoid injury from by a high degree of care. Ordinarily, the duties of a conductor do not expose him to the perils from open frogs. In the discharge of the duties of his employment he does not usually feel called upon to assist, in switching or coupling cars, and, if his attention should be directed to the dangers from the open frog, he might reasonably conclude that he would not very often, if ever, be exposed to its hazards in making a coupling over it. In the case of *Patterson v. Railroad*

Co., 76 Penn. St. 389, the court said: "If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. * * * But where the servant, in obedience to the requirement of the master, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

It is also claimed that the negligence of the deceased caused or contributed to his death, and that, therefore, the defendant is not liable. One of the brakemen testified that they came into Wells behind time, and that he made two attempts to couple the car onto the train, and the other brakeman made one; that the deceased then said that he believed he could make it, and went in, and failed; that the link was too short; that he said to the deceased that his foot was in the frog; the deceased then took it out, and stepped out beside the track; that witness then got a longer link, and the deceased again went in to make the coupling, and the toe of his shoe caught in a frog, and the deceased was run over and killed. Witness further said there were about five minutes between the time the deceased came out and the time he went in again and was killed. The fireman who was managing the engine at the time testified that, when the train backed down to couple onto the cars, one of the brakemen tried to make the coupling, but failed; then the other brakeman stepped in, and he failed, but still signaled to back up, and went in a second time, and as he came out the conductor came up, and the signal was given again to back up, and he stepped in between the cars, and then stepped out, and walked down in the same direction the train was moving, giving signals all the time to come back. He walked fifteen feet probably, and stepped in again, and the witness saw no more of him till after he was run over. It would seem from the brakeman's testimony that the deceased made his second attempt at the same place he made the first, and that the toe of his shoe caught in the same frog that the brakeman told him to take his foot out of. He says about five minutes intervened between the two attempts, and it appears that the cars to

be coupled were moved at each attempt, and the inference from the fireman's testimony is that the place of the second attempt of the deceased was about fifteen feet from the place of the first. If so, the statement of the brakeman that the deceased placed his foot in a frog when making his first attempt may not be correct.

The evidence shows but three frogs — two at one place, and one at another — and their distance apart does not correspond with the distance between the places where the two attempts were made. This evidence presented a conflict for the jurors to consider, and reconcile if they could, and, in case they could not, to determine whom they would believe. The deceased had been conductor seven years, and before that he was a brakeman. He had experience, and probably possessed skill, as a car-coupler, and it was his duty to get his train through, and he was behind time, and was still delayed with the coupling. Under these circumstances, he made his last effort. At the time, his attention must have been directed to the link he was endeavoring to manipulate, and to the movement of the cars, not to where he was stepping. In moving his feet, under these circumstances, he did not raise one of them high enough, and the toe of the shoe caught in the frog. The jury must have found that he used due care, and that his negligence did not contribute to the fatal injury. The jury were not required to test the conduct of the deceased by some imaginary standard requiring unusual care. He was only required to exercise ordinary care, such as might be reasonably expected of experienced brakemen under similar circumstances. The court below overruled the defendant's motion for a new trial, and entered judgment on the verdict.

It was within the province of the jury to reconcile the statements of the witnesses, so far as they could on any reasonable hypothesis, and to judge of their credibility, to draw all reasonable inferences from the facts in evidence, and to determine what the conduct of the deceased was, and the circumstances surrounding him, and how his mind was occupied at the time of the fatal injury. When there is any evidence in support of a verdict, it will not be set aside because it is against the weight of the evidence, unless it is so clearly wrong as to authorize the court to believe it was the result of a mistake, or that the jurors acted from passion or prejudice, or some other improper motive. *Kane v.*

Railway Co., 128 U. S. 91; 9 Sup. Ct. Rep'r, 16, was an action to recover damages in consequence of an injury to a brakeman from a missing step which he knew was gone, but failed to think of at the time of the injury. The court said, in the conclusion of its opinion: "We are of opinion that the court erred in not submitting to the jury to determine whether the plaintiff in forgetting or not recalling, at the precise moment, the fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery." The following cases we regard as analogous in principle to the case in hand, and support this decision: *Snow v. Railroad Co.*, 8 Allen, 441; *Plank v. Railroad Co.*, 60 N. Y. 607; *Devlin v. Railway Co.*, 87 Mo. 545; *Railway Co. v. Bayfield*, 37 Mich. 205; *Fernandes v. Railway Co.*, 52 Cal. 45.

The case of *Snow v. Railroad Co.*, supra, was instituted to recover damages for an injury in consequence of stepping into a hole in a plank between the rails of the track. This language appears in the opinion: "Nor do we think it was any the less a question of fact to be decided by the jury because it appeared that the plaintiff had previous knowledge of the defect in the road which caused the accident. This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it." The danger causing the injury complained of in the cases cited was the only one shown of the same character, while in this case the frogs in the defendant's track were all open and dangerous. And this is urged as a material distinction. But we incline to the opinion that a careful man, informed of a number of open frogs, would be as likely to overlook one happening in his way, when making a coupling, as he would with knowledge of but the one causing the injury. Whether the failure to recall the danger at the time

of injury in either case could be consistent with common prudence would be a question for the jury to determine.

The judgment of the district court is affirmed.

Anderson and Blackburn, JJ., concur.

Contributory negligence — prior knowledge of defect causing the injury. — It is not necessarily contributory negligence to drive over a crossing known to the plaintiff to be defective. *St. Louis, etc., R. Co. v. Box*, 1 Am. R. R. & Corp. Rep. 226. Or to travel on a sidewalk known to be out of repair. *City of Ft. Wayne v. Breese*, post.

SHERMAN CENTER TOWN CO. v. SWIGART.

(23 Pac. R. 560; 43 Kans. 292.)

1. CORPORATIONS. EXECUTION OF CONTRACT BY. BURDEN OF PROOF. Where the president and secretary of a corporation execute a contract in behalf of the company, which is regular on its face, and not shown to be outside of the regular business of the corporation, it is *prima facie* evidence that it was executed with authority; and those who deny the authority take upon themselves the burden of establishing their claim.

2. AUTHORITY OF OFFICERS TO MAKE CONTRACT. Where the president and secretary of a corporation act openly and publicly as its agents in making contracts, and generally in managing its business, with the understanding and acquiescence of the directors that they shall so act, the corporation will not be relieved from liability upon contracts so made, upon the mere ground that the directors failed to formally confer authority on these officers by vote or resolution entered on the records of the corporation.

J. H. Sterling for plaintiff in error. *Bagley & Andrews* for defendant in error.

JOHNSTON, J. William B. Swigart brought this action against the Sherman Center Town Company, to recover damages for the breach of a contract by which the company bound itself to remove a building, with a stock of goods which was therein, from Itasca to Sherman Center, and there place the building, upon lots which the company agreed to convey to Swigart, in good condition, over a cellar and foundation similar to that upon which it stood in Itasca. The cause was tried without a jury, and a general finding made by the court that Swigart was entitled to recover from the town company \$250, and upon this judgment was entered. Some argument is made that the making of the

contract was not within the chartered powers of the company, but this question is not raised by the pleadings, and there is nothing in the record which discloses what the authorized purposes of the company are.

The principal contention is that the contract was entered into without authority from the directors of the company. There is sufficient evidence, we think, to sustain the general finding, holding the company liable on the contract. It was executed in due form by the president and secretary of the company, and, being regular upon its face, and executed by the duly-constituted officers of the corporation, it is *prima facie* evidence that it was executed with authority; and those who deny the authority take upon themselves the burden of establishing their claim. The company has received the benefits of the contract, and no question regarding the authority of the officers was raised until about the time this action was brought. The board of directors consisted of seven members, a majority of whom resided in Sherman Center, and were fully cognizant that the president and secretary were acting for the company, and had made this and many other similar contracts in behalf of the company. Some claim is made that no authority had been formally conferred upon them to represent the company, and that the rules governing the corporation did not warrant them in the exercise of the powers which they assumed to exercise; but there is no competent proof what the charter and by-laws of the corporation provided, nor was the record of the official proceedings of the board of directors offered in evidence. Express authority by resolution, directing the president and secretary to represent the company, and execute the contracts, is not indispensable to the exercise of that power by these officers, as their authority may be implied from their conduct and acquiescence of the directors. The general understanding among the directors was that the president and secretary should act for the company in making contracts, and in managing the business affairs of the corporation. They acted openly and publicly as the agents of the company, with the full knowledge and acquiescence of the directors. The president of the corporation testified that there was no vote or resolution formally entered authorizing them to make contracts and manage the affairs of the corporation, and that the reason that a meeting was not called for

that purpose was that they had been advised by their attorney that that procedure was unnecessary to the exercise of such authority. While he says that no official record was made of their authority, it was understood among them that the president and secretary should do the business of the company. We think the legitimate inference to be drawn from the testimony is that they were legally authorized to act for the company, and that it should not escape liability upon its contracts on the mere ground that the authority was not expressly conferred by resolution entered upon the records of the corporation. *University v. Martin*, 39 Kans. 750; 18 Pac. Rep'r, 941; *Giles v. Ortman*, 11 Kans. 59; *Durham v. Coal Co.*, 22 Kans. 232.

The refusal to continue the cause is assigned as error, but a sufficient showing of diligence to obtain the testimony of the absent witness was not made, and the court certainly did not abuse its discretion in denying the application.

The other objections are not of sufficient importance to require notice.

Judgment affirmed; all the justices concurring.

As to authority of officer to bind the corporation, see *Huntington v. Attrill*. 1 Am. R. R. & Corp. Rep. 318.

MILLS v. CHICAGO, M. & ST. P. RY. CO.

(45 N. W. R. 225; 70 Wis. 492.)

1. RAILROAD COMPANIES. SETTING FIRES. CONTRIBUTORY NEGLIGENCE
One of defendant's engines set fire to combustible material on its right of way, from which the fire spread to the plaintiffs' cranberry marsh and caused the damage sued for. One of the plaintiffs was at work about three-fourths of a mile from where the fire started and saw the smoke about fifteen minutes after the engine passed. He stopped with his men to eat dinner before going to the fire and arrived some ten or fifteen minutes later than he might have done. It was then impossible to extinguish it. Held, that although the plaintiffs were guilty of negligence in not going immediately to the fire, yet if they could not have put out the fire had they gone without delay, the plaintiffs could recover.

2. EVIDENCE AS TO NEGLIGENCE OF COMPANY. Where the evidence tended to show a faulty construction of the damper and ash-pan which facilitated the escape of coals, and also that the same engine set three other fires the same day within a mile of the one complained of, it was held that the question of the company's negligence was properly left to the jury.

THE plaintiffs are the owners of an improved cranberry marsh, containing several hundred acres, in the county of Monroe, situated south-east of and adjoining the railroad of the defendant company, which runs north-east from Tomah to Grand Rapids. The marsh lies between the stations of Valley City and Hitchcock on such railroad. A little before noon, July 2, 1887, locomotive engine No. 512 of the railway company, when passing such marsh going north-east, set fire to certain combustible materials on the right of way, and the fire spread over plaintiffs' marsh, and greatly injured it. This action was brought to recover for such injury. It is alleged in the complaint that the engine was defectively constructed and was out of repair, thereby rendering it liable to set fires upon the right of way as it passed along the railroad; that the railway company was further negligent in allowing combustible materials to remain on its right of way; and that such negligence and the defective condition of the engine caused the fire which destroyed or injured the plaintiffs' property. It also alleges that plaintiffs did all in their power to stop the fire. The answer is, substantially, a general denial. A trial of the cause resulted in a verdict for plaintiffs for \$3,000. It is conceded that, if plaintiffs are entitled to recover, the damages are not excessive. A statement of the errors assigned, and the testimony and rulings of the court on the trial bearing upon the alleged errors, will be found in the opinion. Motions to direct a verdict for the defendant and for a new trial were denied, and judgment for the plaintiffs entered pursuant to the verdict.

The defendant appeals from the judgment.

Burton Hanson for appellant. *J. M. Olin* for respondents.

LYON, J. (after stating the facts as above). The court submitted to the jury the questions whether engine No. 512, which set the fire that spread over plaintiffs' marsh, was properly constructed and in proper repair, and whether the right of way, at the time of the fire, at the point where it commenced, was reasonably clear of combustible materials. The court also instructed the jury, on the testimony hereinafter stated, that the plaintiff Arthur C. Mills, who was in the vicinity of the fire when it started, was negligent in not going to the fire with his men and making an effort to extinguish it, or prevent its spreading upon the plain-

tiffs' marsh, as soon as he should have done, but submitted to the jury the question whether, had he done so promptly, he could have prevented the injury complained of. The submission of these questions to the jury are the errors assigned for a reversal of the judgment. As to the questions of the condition of the engine and right of way, it is maintained by counsel for the railway company that, on the undisputed evidence, the court should have answered them in the affirmative. The same claim is made in respect to the other question; and it is further claimed that Arthur C. Mills was negligent in not promptly going to the fire and making a diligent effort to extinguish it, even though the jury might believe from the testimony that such effort would have proved unsuccessful. The last proposition will be considered first, because, if sustained, it defeats the action.

I. When engine No. 512 passed the point where the fire commenced, Arthur C. Mills was at work with his men about three-fourths of a mile distant therefrom. About fifteen minutes later, he saw smoke arising from the right of way at that point. With two of his men, he immediately went to the railroad near their boarding-house to get a better view of the fire. The three then went into the boarding-house, hastily ate their dinner, and went on a railroad velocipede to the place of the fire. They found the fire had crossed a ditch which the plaintiffs had constructed along the line of the railroad, about four rods distant therefrom, to prevent the spread of fire from the right of way, which ditch usually contained water. It was then a period of drought, and there was no water in the ditch or vicinity. They only had shovels with them with which to resist the spread of the fire. The soil was peat, covered with moss and grass, all of which was very dry and highly inflammable. All of these men had heretofore had much experience in fighting fires, and they at once decided, when they reached the fire, that, with appliances at their command, it would be useless to attempt to stay its progress. They did not make the attempt. When they went for their dinner the wind was blowing somewhat strongly from the west, but had increased greatly in force when they reached the fire. The jury might properly have found from the testimony that they reached the fire within forty-five minutes after they first discovered it, and could not have reached it, had they gone there

as speedily as possible, in less than thirty or thirty-five minutes. Because of this delay of ten or fifteen minutes, the court held, as matter of law, that Arthur C. Mills was guilty of negligence which would defeat the action, unless the jury were satisfied that he and his men could not have prevented the spread of the fire upon the marsh, had they reached there as soon as possible. There is other testimony bearing upon the question of such negligence, which need not be stated here, but which, taken in connection with the testimony above stated, leads us to doubt whether the court was justified in taking that question from the jury. But the ruling is in favor of the defendant, and, if erroneous, does not affect this appeal. The question here is whether it can justly be said that the failure of Arthur C. Mills to get to the fire earlier, and to attempt to arrest its progress, is to be imputed to the plaintiffs as negligence which will defeat this action, although the jury might find that, had he done so, he could not have prevented the fire from running over the marsh. Following the great weight of authority both here and in England, we must determine this question in the negative. If it is made to appear that the marsh would have been burned just the same had Arthur C. Mills and his men reached the place of the fire at the earliest possible moment, and had then made every exertion to stay the progress of the fire, such want of promptness and effort will not defeat the action. Cooley Torts (1st ed.), 674 (2d ed.), 812, and numerous cases there cited. There was abundant testimony tending to show that such promptness and effort would have been entirely unavailing to prevent the burning of the marsh. It must be held, therefore, that the question in that behalf was properly submitted to the jury.

II. As to the condition of engine No. 512, the testimony tended to show that the bottom of the ash-pan of that engine was too short, the effect thereof being to allow the damper to hang too nearly perpendicular, thus rendering it liable to swing open when the engine was in motion. This facilitated the dropping of coals of fire falling against the damper. Also, that to prevent the escape of fire the bottom of the ash-pan should have been turned up at the end so as to hold the damper at a proper slope when it rested upon the ash-pan, and that the ash-pan of engine No. 512 was not so constructed. It was further proved that this engine, No. 512,

set three other fires while running a little more than one mile from the place where it set the fire which burned over plaintiffs' marsh. The court held it conclusively proved that the engine was properly operated. Such being the fact, it is a very significant circumstance, bearing upon the question of the condition of the engine, that it set four fires while running so short a distance. In view of the foregoing and other testimony in the case, we conclude that the question was properly submitted to the jury whether the engine was or was not in a reasonably safe condition.

III. It is only necessary to say, concerning the remaining error assigned, that there was sufficient evidence concerning the condition of the right of way to justify the court in submitting to the jury the question whether, at the time of the fire, it was in a reasonably safe and proper condition in respect to combustible materials upon it.

The foregoing views dispose of all the alleged errors adversely to the defendant. The judgment of the circuit court must, therefore, be affirmed.

FIRES FROM LOCOMOTIVES.

1. **The law of negligence in such cases.**—The fact that a fire is kindled by sparks from a locomotive is presumptive evidence of negligence on the part of the railroad company. *Daly v. Chicago, etc., Ry. Co. (Minn.)*, 45 N. W. Rep'r, 611; *Kelsey v. Chicago, etc., Ry. Co. (S. D.)*, 45 N. W. Rep'r, 204; *Koontz v. Oregon Ry. & Nav. Co. (Or.)*, 23 Pac. Rep'r, 820; *Chicago, etc., R. Co. v. Goyette (Ill.)*, 24 N. E. Rep'r, 549.

When this presumption is rebutted by satisfactory evidence that the locomotive which set the fire was properly constructed, was in good repair and carefully managed at the time, there must be proof of other negligence in order to sustain a recovery. *Ibid.* Such presumption is not rebutted by merely showing that such engine was provided with the best and most approved appliances, but it must also be shown that such appliances were in good order and repair, and that there was no negligence in their use. *Chicago, etc., R. Co. v. Goyette (Ill.)*, 24 N. E. Rep'r, 549.

It is negligence to allow an accumulation of dry grass or other combustible material upon a railroad right of way. *Kelsey v. Chicago, etc., Ry. Co. (S. D.)*, 45 N. W. Rep'r, 204; *Chicago, etc., R. Co. v. Goyette (Ill.)*, 24 N. E. Rep'r, 549.

2. **Pleading.**—In actions of this character the declaration or complaint should identify, as nearly as possible, the particular engine which set the fire, in order that the company may investigate its condition and management at the time. *Koontz v. Oregon Ry. & Nav. Co. (Or.)*, 23 Pac. Rep'r, 820. An allegation that an engine of the defendant at the time and place specified, caused the destruction of the plaintiff's property by reason of negligence, etc., is not sufficient. *Ibid.* An averment in a complaint that "while the

defendant was running a locomotive over its track, sparks and fire escaped from the locomotive, and negligently set fire to grass upon the plaintiff's land, and burned and destroyed, etc., and that said fire, injury and damage were not in any manner caused by the act, fault or neglect of the plaintiff, but wholly by the negligence and carelessness of the defendant," was held good on demurrer though not aptly worded. *Ohio, etc., Ry. Co. v. McCartney* (Ind.), 23 N. E. Rep'r, 258.

3. **Evidence.**—In consequence of the difficulty in identifying a passing engine, so as to make direct proof of negligence, and for the reason that the business of running railroads supposes a unity of management and a similarity in construction of the engines, the admission of evidence, as to other and distinct fires from the one alleged, is permitted. *Koontz v. Oregon Ry. & Nav. Co.* (Or.), 23 Pac. Rep'r, 820. But where the particular engine which set the fire is known, evidence that another of the defendant's engines set a fire at another time and place is inadmissible. *Ireland v. Cincinnati, etc., R. Co.* (Mich.), 44 N. W. Rep'r, 426. Evidence that the fire was of incendiary origin is competent for the defense. *Ibid.* In the following cases the evidence was held sufficient to sustain a verdict for the plaintiff. *Beggs v. Chicago, etc., R. Co.* (Wis.), 44 N. W. Rep'r, 633; *Clune v. Milwaukee, etc., Ry. Co.* (Wis.), 44 N. W. Rep'r, 943; *Doyscher v. Chicago, etc., Ry. Co.* (Minn.), 45 N. W. Rep'r, 719. See, also, *Hoffman v. Chicago, etc., Ry. Co.*, 45 N. W. Rep'r, 608.

4. **Instructions.**—On the trial of an action for setting fire to the plaintiff's grain and crops, the court instructed the jury as follows: "If the defendant owned the road on which the locomotive ran, and the locomotive did set fire as alleged, the presumption is that it was the negligence of the owner of the road, and this presumption continues until the contrary appears from the evidence. If an expert testifies that he operated the locomotive at that time with due care and thought, and it was so constructed that it would not set fire as thus operated, and the jury believe from the evidence that it actually did set fire at that time, the jury are to consider which of these proofs they will believe, the former or the latter." Held, that the instruction was confused and ambiguous and might reasonably be construed to mean that if the fire was set by the engine the plaintiff might recover, which is not the law. *Columbia, etc., R. Co. v. Farrington* (Wash.), 23 Pac. Rep'r, 413. Other instructions are passed upon in *Rost v. Missouri Pac. Ry. Co.* (Tex.), 12 S. W. Rep'r, 1181; *Chicago, etc., R. Co. v. Goyette* (Ill.), 24 N. E. Rep'r, 549.

PFISTER V. GERWIG.

(23 N. E. R. 1041; 129 Ind. 567.)

1. **INSURANCE. MUTUAL COMPANIES. TRANSFER OF PROPERTY.** Action on a policy in the German Mutual Insurance Company by the administrator and widow of deceased. The policy covered both personal and real property. The property was destroyed after the death of assured and after the administrator had obtained an order to sell the property for the payment of debts. A by-law of the company provided that a transfer of the property should ren-

der the policy void. Held, that a transfer by operation of law upon the death of the assured did not avoid the policy.

2. BY-LAW AGAINST INCUMBERING PROPERTY. The by-laws of the company provided that any transfer or incumbrance of the property, whether by mortgage, judgment lien or otherwise should cancel the policy unless ratified by the board of directors. A mortgage of the real estate insured was proved. Held, fatal to the right to recover.

3. DUTY OF MEMBERS TO ASCERTAIN BY-LAWS. Those who became members of mutual companies are bound to take notice of the by-laws of the company, and they cannot assail them on the ground that they were not legally adopted.

4. PARTIES. Held, without deciding in whom the right of action would be to recover for the loss of the real estate, that no action could be maintained by the plaintiffs jointly.

ELLIOTT, J. This action is prosecuted by Aloysius Pfister, administrator of the estate of Joseph Gerwig, deceased, and by Rosina Gerwig, widow of the intestate, against the German Mutual Insurance Company and eight children of the deceased. The complaint is founded on the policy of insurance issued to the intestate in his life-time, and conditioned that the loss shall be payable to the insured, his heirs, executors or administrators. Both personal and real property are covered by the policy, and each species of property is separately insured. After the death of the insured, the property described in the policy was destroyed by fire. It is averred in the complaint that the administrator obtained an order to sell the property for the payment of the debts of the decedent, but before the sale was made the property was burned.

One of the paragraphs of the answer sets forth a by-law of the company forbidding the transfer of the property, and providing that in case of a transfer the policy shall be void; and it is averred that a transfer was made by operation of law, inasmuch as the death of the assured transferred the property to his heirs. To this paragraph a demurrer was properly sustained, for the reason that a transfer to the heirs or executors or administrators, by operation of law, upon the death of the insured, did not avoid the policy in this instance. The facts pleaded do not bring the case within the class of cases represented by *Hine v. Woolworth*, 93 N. Y. 75, for the reason that the inhibition in the policy and by-laws does not cover a transfer made by law upon the death of the assured to his heirs or personal representatives.

The seventh paragraph of the answer sets forth a by-law, and avers that it was violated by the assured by the execution of a mortgage. The by-law pleaded reads thus: "Transfers of policies are to be made only by the assent of the board of directors. Every transfer or incumbrance of the property, whether by mortgage, judgment lien, or otherwise, after the same has been insured in the company, cancels the policy, and the same is null and void, except such transfer or incumbrance is ratified by the board of directors, and shall be noted on the policy." The answer is addressed to so much of the complaint as seeks a recovery for the value of the real estate, and offers to confess judgment for the value of the personal property. Issue was formed by a reply. The mortgage was introduced in evidence, and the court instructed the jury to find for the defendant, the insurance company. The defendant subsequently paid into the court the amount of the insurance upon the personal property, and the penalty provided by statute. The plaintiffs accepted the sum paid into court, and, as the record recites, "waive the error arising from the failure of the jury to find in their verdict against the defendant, the German Mutual Fire Insurance Company of Indiana, for the damages for such loss upon the counters and shelving described in the policy of insurance set up in the complaint, but waive nothing further." It thus appears that the plaintiff recovered and received the full value of the personal property, so that the only question is as to the right to recover the value of the real estate destroyed by fire. There is some conflict in the authorities as to whether an administrator can sue on a policy of insurance on real estate executed to the decedent in cases where the property is burned after his death. Mr. Crosswell says: "The money paid over under a policy of insurance on buildings is personal property, if paid before the death of the decedent; but if the buildings are destroyed after the death of the decedent the money is real estate." *Crosw. Ex'rs*, § 357. In *Wyman v. Wyman*, 26 N. Y. 253, it was held that the heirs may sue; and other cases lay down a similar doctrine. *Burbank v. Insurance Co.*, 24 N. H. 550; *Culbertson v. Cox*, 29 Minn. 309; 13 N. W. Rep'r, 177. But in *Lappin v. Insurance Co.*, 58 Barb. 325; *Insurance Co. v. Dodge*, 44 Mich. 420; 6 N. W. Rep'r, 865, a somewhat different doctrine seems to be asserted. We do not, however, deem it necessary to decide this question,

for the case may be disposed of on other grounds. If it be true that the heirs alone can maintain the action, then the administrator has no cause of action; but if it be true that the administrator alone can sue, then the heirs have no cause of action; and, therefore, whatever view be taken, the complaint is bad, since it is firmly settled that a complaint by two or more persons must show a cause of action in all, or it will be bad on demurrer. The rule, as asserted in a long line of decisions, is that a complaint not good as to all of the plaintiffs is not good as to any of them. *Brumfield v. Drook*, 101 Ind. 190; *Insurance Co. v. Kittles*, 81 Ind. 96; *Schee v. Wiseman*, 79 Ind. 389; *Berkshire v. Shultz*, 25 Ind. 523.

We regard the transfer by mortgage as fatal to the right of recovery. A person who enters a mutual insurance company becomes a member of the company, and is bound to take notice of the by-laws in force at the time he acquires his membership. *Bauer v. Samson Lodge*, 102 Ind. 262; 1 N. E. Rep'r, 571; *Holland v. Taylor*, 111 Ind. 121; 12 N. E. Rep. 116; *Supreme Lodge v. Knight*, 117 Ind. 489; 20 N. E. Rep'r, 479; *Gray v. Supreme Lodge*, 118 Ind. 293; 20 N. E. Rep'r, 833.

It is urged that the directors had no authority to adopt the by-law relied on by the appellee. To this position there are two answers: First. The articles of association, corresponding to what the text-writers call the "constating instrument," confer authority upon the board of directors to enact by-laws; and this is a valid delegation of authority. *Wood's Field Corp.*, § 266. Second. A person who becomes a member of a mutual insurance company assents to the by-laws under which he acquires a membership, and he cannot afterward successfully assail their validity on the grounds that they were not regularly adopted. Or, as Mr. Waterman states the rule: "A person who has voluntarily become a member of a corporate body cannot object that the corporation had no power to make a by-law." 1 *Wat. Corp.* 235. There is an essential difference between strangers and the members or stockholders of a corporation; for strangers are not always precluded from questioning the validity of by-laws, nor always bound to take notice of them, although there are instances in which they cannot question them, and wherein they are chargeable with notice of them. 1 *Wat. Corp.* 273. One of the duties

of a person who becomes a member of a mutual insurance company is to inform himself of its by-laws, and he cannot escape their force although he may have had no actual knowledge of them. A very strong application of this rule was made in a mutual insurance company case in which Chief Justice Gibson, declared that without such a rule mutual companies could not exist. *Insurance Co. v. Perrine*, 7 Watts & S. 348. In the case of *Miller v. Association* (N. J.), 7 Atl. Rep'r, 895, the general doctrine was carried very far, the court saying: "But it is clear that a member of the company is chargeable with notice of all the by-laws of the company, and of the conditions of insurance adopted by the company, whether contained in the by-laws or in resolutions." It is, perhaps, to be regretted that the legislature has not required by-laws of a character directly affecting the contract of insurance to be set forth in the policy; but that is a matter for the legislature, and not the courts.

Judgment affirmed.

Insurance — change of title by operation of law.—A policy provided that it should be void if any change should take place in the title, use, occupation or possession of the property whatever. It was held that a change of title by reason of the death of the insured was not within the condition. *Richardson's Admr. v. German Ins. Co.*, 1 Am. R. R. & Corp. Rep. 703.

LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY COMPANY v.
PETTY.

(7 So. R. 351; 67 Miss. 255.)

RAILROADS. NEGLIGENCE. FELLOW-SERVANT. One, whose duty it is to fill the sand-box of an engine with sand, is a fellow-servant with the brakeman on the engine, and the latter cannot recover for an injury due to the neglect of the former to fill the box properly.

W. P. & J. B. Harris for appellant. *D. C. Bramlett* and *H. C. Capell* for appellee.

CAMPBELL, J. The evidence tends to show that the injury received by the appellee was caused by the want of sand in sufficient quantity in the sand-box on the engine, but there is no evidence how it came about that the supply of sand was insuffi-

cient. Whether the engine was furnished properly, in this respect, at the start, and had exhausted the supply or started unfurnished, does not appear. If the latter be true, it was because of the failure of duty of that servant of the company whose duty it was to fill the sand-box suitably; and for an injury suffered by reason of the negligence of such fellow-servant the appellee, a brakeman on the train, has no claim on the company, it not being made to appear that it was at fault as to the selection or retention of the servant, or in any other respect, as to this service. No rule of common law is more universally affirmed than non-liability of the master to one of his servants for an injury caused by the negligence of a fellow-servant engaged in the common service; and it was distinctly announced in this state, more than sixteen years ago, that all employes of a railroad company, engaged in merely operative service connected with the carrying on of the business of running trains, are fellow-servants, and that the common employer is not responsible to one of these for injuries caused by the negligence of another. Undoubtedly the "hostler" or yard servant, charged with the duty of supplying the engine before starting it on the road, with fuel, water, sand or other needed thing, is a mere servant, and not the agent or representative of the master, except in that qualified and subordinate sense in which every servant may be said to be; and if it be true, which has not yet been affirmed in this state, that certain employes of a railroad company are not fellow-servants of the army of employes employed in doing the work of carrying on the business, it would yet be true that the appellee and the laborer whose default is supposed to have led to his hurt were fellow-servants, and no liability attached to the common master. The rule on this subject announced in *Railroad Co. v. Hughes*, 49 Miss. 258 (decided in 1873), and reaffirmed with emphasis in *Howd v. Railroad Co.*, 50 Miss. 178 (1874), has remained undisturbed by judicial or legislative enactment, and must be regarded as the accepted doctrine in this state; and we must not be expected to follow the devious ways of those courts which, in bending the rule, which all acknowledge, to effect their ideas of justice in particular cases, have well nigh destroyed the rule itself. This rule, as held in this state, and in several other states of the United States, and in England, is a simple one, just in its principle, politic in its appli-

cation, because conservative of life and property, and easily understood and applied, while all efforts to vary and qualify it have involved courts undertaking it in endless contradictions and difficulties.

The writer of this opinion was at the bar, and was sought to be employed to bring the action of Railroad Co. v. Hughes, cited above, and after careful consideration of the case, with the facts before him, declined to act as counsel, on the ground that the law was believed to be against the right to recover on those facts which circumstance is mentioned to show that, before any announcement of the law on this subject in this state, the writer had reached the conclusion afterward announced in the very case which had been offered him as counsel and declined. This conclusion was based on the law of master and servant as laid down in books which were accessible. The case was not tried on the principles announced in this opinion, and a new trial must be had.

Reversed and remanded.

Fellow-servants — recent decisions. — An assistant road master having charge of one hundred and fifty miles of defendant's railroad and control of all section gangs in that distance, held to represent the company and not to be a fellow-servant with one of the section hands working under his immediate directions in loading a car. *Harrison v. Detroit, etc., R. Co.* (Mich.), 44 N. W. Rep'r, 1084. In the above case the section hand was knocked off the car on which he was at work by an engine backing against it. The engine was under the sole control of the engineer and fireman. The latter were held to be fellow-servants with the section hand. A road master in charge of a working train and with power to employ and discharge the men, held to be a fellow-servant with a section hand riding on the train. *Galveston, etc., R. Co. v. Smith* (Tex.), 13 S. W. Rep'r, 563. A switchman was killed by lumber falling from a car which was negligently loaded by other servants of the company. Held, that the latter and the switchman were fellow-servants. *Ford v. Lake Shore & M. S. Ry. Co.* (N. Y.), 22 N. E. Rep'r, 946. The foreman of a gang employed in removing stones from near the track is a fellow-servant with the members of the gang. *Kinney v. Corbin* (Penn.), 19 Atl. Rep'r, 141. One engaged in coupling cars was injured by falling into a pit negligently left uncovered by other employes of the company who had removed the covering to make repairs. Held, negligence of fellow-servants. *Filbert v. Delaware & H. Canal Co.* (N. Y.), 28 N. E. Rep'r, 1104. A brakeman and a car inspector held not to be fellow-servants. *Daniels v. Union Pac. Ry. Co.* (Utah), 23 Pac. Rep'r, 762. So as to a yard switchman and the engineer of the locomotive used in switching. *Louisville, etc., R. Co. v. Sheets* (Ky.), 13 S. W. Rep'r, 248. Plaintiff in error was engaged in operating a railroad in this state, and, for the purpose of securing the removal of his coal from the coal pocket into the tender, gave an independent contract to one H. to place the coal in

the proper pocket prepared by the plaintiff in error, and from which to load the tenders of the locomotives by which the line was operated. H. hired his own assistants, paying them out of his own means, by whom alone they were employed and discharged, and to whom alone they looked for their compensation. Defendant in error was employed by him to assist in this work, his duty being to notify the engineers as to the proper position in which their engines should be placed for receiving the coal, and to place the coal in the tender; but in which the engineer rendered no assistance. It was the duty of the engineer to place the engine in its proper place, leaving it stationary until the coal was loaded; but in the discharge of which he received no assistance from defendant in error. It was held that the engineer and defendant in error were not fellow-servants, under the rule exempting the railroad company from damages resulting from the negligent act of fellow-servants. *Union Pac. Ry. Co. v. Billeter* (Neb.), 44 N. W. Rep'r, 483.

Plaintiff was employed by the city as a laborer, excavating a trench in the earth for the laying of water-pipes. Upon other laborers in the same employment, and working in connection with plaintiff, devolved the duty of putting in wooden curbing as the work of excavation progressed, and as the laborers saw the need of it, to prevent the earth falling into the trench. Held, that such laborers were fellow-servants with the plaintiff, for whose negligence in putting in the curbing the city was not responsible. *Bergquist v. City of Minneapolis*, 44 N. W. Rep'r, 530.

A crew of men, of which plaintiff was one, was engaged in repairing a bridge on defendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened, and was blown shut by the wind, and injured the plaintiff while at work between the stationary part of the bridge and draw. Held, that defendant was not liable. *Johnson v. St. Paul, etc., Ry. Co.*, 45 N. W. Rep'r, 156.

STATE V. PENDEGRASS.

(10 S. E. R. 1002; 106 N. C. 664.)

1. **MUNICIPAL CORPORATIONS. ORDINANCES. MARKETS.** An ordinance prohibiting the sale of fresh meats within the corporate limits, outside of the market-house of the town, is a valid police regulation.

2. The ordinance applies to a sale made within the corporate limits, but not at the market-house, though the meats are kept, and delivered from a stall outside the limits.

THIS was an indictment for a violation of an ordinance of the town of Durham in selling fresh meat in the town, and not at the market-house, tried at October term, 1889, of the superior court of Durham county, before Graves, J.

The jury returned a special verdict: "The jury find the following facts: The town of Durham is a municipal corporation, with power under its charter, and under the general law, to regulate its markets, and prescribe at what place and in what manner in the town shall be sold marketable things. That the town of Durham has established a market-house sufficient in size, and conveniently located, for the sale of marketable things. That the board of commissioners of the town aforesaid, at their meeting held on June 18, 1889, enacted the following ordinance: 'No persons shall sell any fresh meats within the corporate limits of the town of Durham outside the market-house of said town; provided, that this ordinance shall not apply to persons selling beef, of their own raising, by the quarter. Any person violating this section shall be fined five dollars for each day said ordinance is violated, and after the first day of July, 1889.' That on the 25th day of September, 1889, the defendant, within the corporate limits of the town of Durham, and outside the market-house of said town, offered to sell fresh meat, to-wit, beef, not of his own raising, and not by quarter, to William Shelburn and Charles P. Haweston and others, living within the corporate limits of said town, and said William Shelburn and Charles P. Haweston and others did thereby agree to buy the same, and that the defendant subsequently, and during the day aforesaid, did deliver the quantities of beef so agreed to be bought at the residences of the said William Shelburn, Charles P. Haweston and others, and the defendant did, at the time and places of delivering, during the day aforesaid, receive from the parties aforesaid the price in money agreed to be paid for said fresh meat; that the defendant obtained the fresh meat delivered as aforesaid from a stall or house outside of the corporate limits of the town of Durham, and at his said stall or house weighed and cut the fresh meat delivered in parcels to the said William Shelburn, Charles P. Haweston, and others as aforesaid. If, upon the foregoing facts, the court be of opinion that the defendant is guilty, then the jury so find for their verdict; but, if the court be of a contrary opinion, then the jury for their verdict find the defendant not guilty." Whereupon it is adjudged by the court that the said defendant is guilty, and that he pay a fine of \$5 and the costs of the prosecution;

from which judgment the defendant prays an appeal to the supreme court.

Attorney-General for state.

AVEERY, J. (after stating the facts as above.) The legislature unquestionably has, and frequently exercises, the right to regulate trade, as contradistinguished from restraining it; and, while it would not be within the purview of its powers to pass a law prohibiting the sale of sound and wholesome meat in any locality, or permitting the authorities of a town to do so, it can confer upon municipalities the power to prescribe by their ordinances the manner of disposing of it, for the purpose of protecting the public health or promoting good government, as by prohibiting it to be retailed except at designated market-places. 1 Dill. Mun. Corp., §§ 380, 386, 389; *State v. Moore*, 104 N. C. —, ante, 144; *Intendant v. Sorrell*, 1 Jones (N. C.), 49. In *St. Louis v. Jackson*, 25 Mo. 37, precisely the same question was presented as that before us; and the court sustained the right of the city of St. Louis, under a general grant by the legislature of power to regulate the sale of meats, to forbid by an ordinance the sale in smaller quantities than one quarter. Towns or cities cannot use this power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the state who may come within the corporate limits. *State v. Moore*, supra; *State v. Chambers*, 93 N. C. 600; 1 Dill. Mun. Corp., § 380. The ordinance before us for construction is general in its character, and is, therefore, like a public law that applies to a particular locality, free from objection as imposing peculiar restraints upon, or extending special privileges or immunities to any one.

There is no error.

Judgment affirmed.

Prohibiting sale of fresh meats except at public market. — In *Newson v. City of Galveston* (Tex), 13 S. W. Rep'r, 868, an ordinance similar to that considered in the foregoing case was sustained. It was also held that one, who had fitted up and maintained a private market, under a license issued pursuant to a prior ordinance, had no vested right to a renewal of the license or to continue business at the old place. The court say: "Under the provisions of the charter empowering the city to establish market-houses, designate, control

and regulate market-places, and to regulate the vending of fresh meats, poultry, fish and other things, no doubt can exist of the power of the city to establish market-houses, and to require fresh meats to be sold there, and also to forbid their sale at other places. Such a power is most necessary for the protection of the health of a city, and has often been recognized under charters not so clearly conferring it as does the charter of the city of Galveston." Citing *Buffalo v. Webster*, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 327; *Winsboro v. Smart*, 11 Rich. L. 552; *Bowling Green v. Carson*, 27 La. Ann. 417; *St. Louis v. Weber*, 44 Mo. 549; *Wartman v. Philadelphia*, 33 Penn. St. 209; *Ash v. People*, 11 Mich. 351; *Le Claire v. Davenport*, 10 Iowa, 210; *Tied. Police Power*, § 104; 1 Dill. Mun. Corp., §§ 381-392.

WEGNER V. SECOND WARD SAVINGS BANK.

(44 N. W. R. 1095; 76 Wla. 243.)

1. **BANKS AND BANKING. REPLEVIN OF PASS-BOOK.** Plaintiff was a depositor in the defendant bank and had the usual pass-book evidencing his deposit. This was stolen from him. The thief presented the book to the defendant, fraudulently personated the plaintiff, and obtained the money deposited. This was an action of replevin by the plaintiff to recover the book or its value. Held, that the action would lie for the recovery of the book.

2. **STOLEN PASS-BOOK. PAYMENT TO WRONG PARTY. LIABILITY.** If the bank paid the money in good faith and without negligence to a person presenting the pass-book, having no notice of the loss of the book, it would not be liable to the plaintiff, and whether it did so or not was a question of fact for the jury.

3. **RULE REQUIRING NOTICE OF WITHDRAWAL FOR BENEFIT OF DEPOSITOR.** A rule of the bank, printed in the pass-book, required thirty days' notice of withdrawals in amounts exceeding \$50. Held, that this rule was for the benefit of the depositor as well as the bank.

4. **CONTRIBUTORY NEGLIGENCE.** Plaintiff was wounded when the pass-book was stolen and did not know of its loss until after the bank had paid the money. Held, there was no evidence of contributory negligence in not giving notice to the bank.

5. **MEASURE OF DAMAGES. INTEREST.** The plaintiff was entitled to recover the amount of the deposit with interest at the statutory rate from the date of demand, although the rate paid by the bank was only three per cent.

THIS was an action of replevin to recover of the defendant bank a pass book which had been stolen from the plaintiff and had come into the possession of the bank through the thief who personated the plaintiff and obtained from the defendant the deposit evidenced by it. The demand of the complaint was for a judgment for the possession of the pass-book or its value, the amount

of the deposit, with damages. There was a judgment for the plaintiff for the deposit and interest.

Howard & Schmitt for appellant. *Winkler, Flanders, Smith, Bottum & Vilas* for respondent.

COLE, C. J. It is a mistake to say that the complaint in this case contains more than one cause of action. It is plainly an action of replevin to recover the pass-book described, and nothing else. It is assumed that the complaint attempts to state a cause of action upon contract, or for the recovery of money deposited with the bank. This is not our construction of the complaint. The action is to recover the possession of the pass-book. This pass-book contained the contract of the parties, the rules and regulations as to the withdrawal of money by the depositor, and the evidence of the amounts deposited, with interest on the same. It was in the nature of a certificate of deposit, and was valuable to the owner. We suppose replevin would lie to recover the possession of the pass-book on the same ground that the action would lie to recover a note or bond by the legal owner. There is no difference in principle between the cases. The pass-book contained the contract and regulations as to the withdrawing of deposits, and, being the property of the plaintiff, he was entitled to its possession. The correctness of this view seems to us too plain for argument. The case of *Davis v. Bank*, 53 Mich. 163; 18 N. W. Rep'r, 629, has no application to the question we are considering, as an examination of the case will show. As between the defendant bank and the plaintiff, it is clear, upon the evidence, that the latter had the lawful right to the possession and control of the pass-book.

A number of exceptions were taken to the rulings of the trial court in admitting or excluding testimony. We shall not notice these exceptions, further than to observe that we do not think there was any error in the rulings of the court on that branch of the case. Some of the questions asked the witnesses, and admitted under objection were clearly competent, while others were unimportant and could not have prejudiced the defense. The real question in the case, and the only one worthy of any contest, is, did the bank, in good faith, and without negligence, pay the amount which the pass-book showed the plaintiff had to his credit

in the bank upon the presentation of such pass-book by a person who had stolen, or fraudulently obtained the possession of, such book, and who fraudulently personated the plaintiff, and signed his name to the receipt; no notice having been given at the time to the bank that the book was stolen. Now, that was a question of fact, for the jury to determine from all the facts and circumstances disclosed by the evidence. It is very clear to our minds that it was not a question of law, for the court to decide. The jury found, on a question submitted, that the defendant was guilty of negligence in the payment of the money to the wrong party. If there was evidence which warranted that finding, it is conclusive, so far as the liability of the defendant is concerned; and we think there was ample testimony to justify such a verdict. We shall not refer to this testimony in detail. Suffice it to say the jury was directed by the court to recall the testimony of the officers of the bank, and of other witnesses produced on its behalf, as to the circumstances under which the money was paid to the party who came with the pass-book, and as to what precautions the bank took to identify such party, and all that was said and done in the matter bearing upon the question of negligence, as the court had defined the term, and then find as the fair preponderance of the evidence indicated the facts to be. The court had instructed that the bank would not be responsible unless its officers had failed to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demanded, whereby such other person suffered a loss or injury. In other words, it must appear that there was a failure on the part of those connected with the bank to do what reasonable and prudent persons would ordinarily do under the existing circumstances, or it must appear that they did not do what such a person would have done, exercising reasonable care and precaution. It seems to us that this charge fairly submitted the question as to whether the defendant was negligent in paying the money to the wrong party. It is admitted that the bank made the payment to a party fraudulently personating the plaintiff in the forenoon of the 2d of July. Among the regulations printed in the pass-book, as to the withdrawal of deposits, was one requiring a previous notice thereof, in writing, of at least thirty days, to be given by the depositor, for all sums of \$50 and

over. No such notice was given or insisted upon in this case. It is said that this rule as to notice for withdrawing deposits was one solely for the benefit of the bank, which it could waive; but we think it was intended, also, to protect the depositor against fraud or forgery. Certainly, if the rule had been observed in this case, or insisted upon, there would have been no loss to any one. It is true the defendant paid the money to a party presenting the pass-book; but there were circumstances calculated to raise suspicion, and which did make the agents of the bank doubt as to his being the man he personated. The marked dissimilarity between the name of the plaintiff as this party wrote it, and the genuine signature in the defendant's signature-book, arrested the attention of such agents; and they required some one to identify him as the plaintiff, which request he attempted to comply with. But it was for the jury to say, in view of all the facts attending the transaction, whether or not the agents of the bank exercised reasonable care and diligence in the means they employed to identify the person to whom the money was paid, and who presented the pass-book, with the real depositor and owner of the pass-book. If they did not exercise that degree of care and diligence, there can be no doubt that the bank is answerable for the consequence of their mistake as to the identity, and for paying the money to the wrong party. The jury having found against the defendant upon that issue, further discussion of that question is uncalled for.

The court likewise submitted the question whether the plaintiff was guilty of any negligence which caused or contributed to the payment of the money to the wrong party. The jury found that he was not, which was the only possible conclusion that could be reached, upon the evidence. The only ground on which negligence could be imputed to the plaintiff was his failure to promptly give the bank notice of the loss of the pass-book. But, under the circumstances, no negligence could be predicated on that ground. The plaintiff was shot and seriously wounded by Eberson, either accidentally or intentionally, on Sunday afternoon. Eberson was the man who stole the pass-book, and drew the money. The plaintiff remained in the barn where he was shot until the evening of that day, when, by the advice of the physician who had been called, he was removed to the hospital. The next morning he endeavored to communicate with his friends, and

have some one look after his valuables, including the pass-book. But it was not ascertained that the pass-book had been stolen until after the bank had paid the money, on the forenoon of the next day after he was shot. Such being the undisputed facts, there was no ground upon which negligence in failing to give the bank notice of the loss of the pass-book could possibly be predicated.

Some criticisms were made upon a charge of the trial court, but we think it is unexceptionable ; and it substantially covers the instructions which were asked on the part of the defendant.

In arguing the case to the jury, one of the plaintiff's counsel used the following language: "For many years I have watched the report [report of the defendant bank], and their deposits are over \$3,000,000," to which language counsel for defendant objected, and asked to have the remark taken down. Plaintiff's counsel, continuing, said: "They [the bank] make three to four per cent on all the loans they make," to which defendant's counsel objected, and took exception to both remarks. We deem these remarks harmless. At least, they do not call for any strictures. They stated, in effect, to the jury, the reports made by the bank as to the amount of their deposits, which were facts probably within the knowledge of the jury themselves. What was said as to the rate of interest the bank made on its loans could not have harmed any one. Besides, there was no ruling of the court as to the propriety of these remarks, further than an admonition to the counsel to confine his remarks to the testimony in the case. That was all the action the court took in the matter.

To the special verdict of the jury the court added a general verdict, finding the value of the pass-book, and assessing damages for its unlawful detention. This general verdict was added pursuant to the consent and stipulation of the attorneys for the parties. The court found the value of the pass-book to be \$710.50, the amount which, upon its face, appeared to be due the plaintiff. *Prima facie*, this was the value of the pass-book to him. The court gave interest on this sum at the rate of seven per cent, according to the ordinary rule, from the time the bank refused to deliver the pass book on demand up to verdict. It is said, because the deposits only drew interest at the rate of three per cent, the interest on the recovery should not exceed that rate. But, as

we have said, this is an action of replevin to recover the pass-book, and the ordinary rules as to damages apply to it. We can perceive no ground for making a distinction between this and other cases in that regard.

We have examined all the authorities cited on the brief of the appellant's counsel, but find nothing in them in conflict with the views which we have expressed. The doctrine of these cases is that the bank is liable for the payment of the money to the wrong party, where the officers of the bank failed to exercise reasonable care and diligence to ascertain whether the person presenting the pass-book was the real owner and depositor to whom the money is due. At least, there is nothing in these cases contrary to that proposition of law. In this case the jury has found, upon sufficient evidence, that the defendant was guilty of negligence in that respect. We think the judgment of the superior court was correct, and must be affirmed.

Savings banks—lost pass-book—Suit to recover deposit. See *Wagner v. Howard Savings Institution*, 1 Am. R. R. & Corp. Rep. 696.

CHICAGO, ETC., R. Co. v. BRUNSON.

(23 Pac. R. 495; 43 Kans. 371.)

1. **EMINENT DOMAIN. DAMAGES. ENTIRE TRACT.** Plaintiff's farm was in one inclosure, but the land taken for right of way for defendant's railroad was all in an eighty-acre subdivision of the same, and that subdivision alone was named in the bond for appeal from the award of the commissioners condemning the land. Held, that evidence showing the damages to the entire farm is competent.

2. **EVIDENCE. STATING AMOUNT OF DAMAGE.** When a witness for a land-owner is asked and testifies, over the objection of the company, that his farm was damaged a certain sum per acre, naming it, by the taking of a right of way through it, this is erroneous; yet if it is shown that the objection made was also to the competency of the witness to testify as an expert, who was competent, and it is also shown that objections to like questions asked other witnesses were sustained, and also that in the course of the trial like evidence had been given to proper questions without any objection of defendant, and the defendant also, in cross-examination, repeatedly asked like questions, the error is not sufficient to compel a reversal of the judgment.

3. **INSTRUCTIONS.** The defendant cannot complain of instructions given, when they are substantially the same as those it requested of the court.

Geo. R. Peck, A. A. Hurd, Stumbaugh, Hurd & Dewey, and

J. G. Egan for plaintiff in error. *Burton & Moore* for defendant in error.

HOLT, C. This was an appeal to the district court of Dickinson county from the award of commissioners condemning a right of way for the Chicago, Kansas and Western Railroad Company over the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 20, township 13, range 1 E., the property of plaintiff; 2.22 acres were taken off of the north end of said tract. Immediately north of the land so taken was the Union Pacific railroad. North of that, the public highway. The plaintiff lived at Solomon City, about a mile distant. In order to get to the highway, both railroads had to be crossed, and there was no other means of getting to Solomon City from this land except by crossing the land of other parties by a circuitous and inconvenient route. There were several other farms in this immediate locality, situated, so far as the road was concerned, substantially like the tract of plaintiff, and the owners were compelled to cross both tracks in order to reach the public road. The entire farm of plaintiff consisted of one hundred and twelve acres, under fence and nearly all tilled. A small house, with one room, a stable for six horses, a feed lot and hog lot, were near the river on the south line of the farm. The commissioners awarded plaintiff the sum of \$161 as damages. Upon the trial judgment was rendered in plaintiff's favor for \$441. The findings specially found by the jury were: "(1) How many acres of plaintiff's land did the defendant take for its right of way? Answer. Two and twenty-two one-hundredths. (2) What was the land taken worth per acre on the 3d day of September, 1887? A. \$50. (3) Do you find from the evidence that the plaintiff has sustained any damage other than that occasioned by the loss of the land taken for the right of way, and the inconvenience and danger in crossing the track of the defendant's railroad in going to and from his farm. A. Yea. (4) If you answer the third question in the affirmative, state the character and amount of the other damage shown by the evidence — depreciation in value of farm. A. \$330."

The bond for appeal from the award of commissioners named only the east half of said quarter. Testimony was admitted, however, for the purpose of showing the damage to the entire tract. Of this the company complains, and urges that damages should be confined

solely to the land mentioned in the appeal-bond. The ruling of the court was correct in admitting this testimony, following the authority of *Reisner v. Railroad Co.*, 27 Kans. 382. It appeared from the evidence in that case that certain lots 13 and 14 were adjacent and occupied as one tract. A part of 13 had been appropriated by the railway company for its right of way, but no part of 14 had been taken, nor was the lot 14 mentioned in the bond for appeal. At the trial evidence was excluded tending to show that it had been damaged. In deciding this question the court, by Mr. Chief Justice Horton, said: "We think evidence should go to the jury as to all actual damages sustained by the land-owner by reason of the right of way appropriated, as to all the premises used as one tract or piece of property, whether it consists of one or more lots — of one or more quarter sections of land. In condemnation proceedings, the company is the party that sets in motion the steps whereby the owner is deprived of his land; and if such company only take a few feet from a tract of property consisting of more than one lot, and used together as one property, the damages are to be assessed with reference to the injury to the whole property, and not to the lot alone from which the right of way is taken." See, also, *Railroad Co. v. Merrill*, 25 Kans. 421.

The defendant further objects to the evidence of W. S. Hunsicker, witness for plaintiff, who was asked: "Question. Have you a judgment as to how much the land was damaged per acre by reason of the road crossing where it does? Answer. Yes, sir. Q. How much? (Objected to by the defendant as incompetent, irrelevant and immaterial, and the witness is not competent to testify. Objection overruled, defendant excepting.) A. About three dollars an acre." The defendant says the same question substantially was asked of George A. Gould, and that he answered by saying the farm had been damaged \$5 per acre. This manner of introducing testimony falls within the rule enunciated in *Railroad Co. v. Ross*, 40 Kans. 605; 20 Pac. Rep'r, 197, and *Railroad Co. v. Kuhn*, 38 Kans. 677; 17 Pac. Rep'r, 322, and, therefore, ought not to have been permitted. However, the only objection by the defendant to the question asked Gould was that he was not a competent witness to testify to the value of this land; the objection did not go to the competency and relevancy of the evidence. Substantially the same question had been asked during

the trial of W. A. Pontius, witness for plaintiff, and upon objection by defendant that the question was incompetent, irrelevant and immaterial the court refused to allow him to answer. All the plaintiff's witnesses were interrogated as to what the value of the land was immediately after the taking of the right of way by the company, and nearly all had testified that it had been damaged to a certain amount, naming it, per acre. No motion to strike out had been made by the defendant; in fact, the question objected to had been repeatedly asked in that form of the various witnesses in cross-examination by defendant itself. It is evident from the whole record, by its rulings upon the admission of testimony, that the court's attention was not called specially to the relevancy and competency of the testimony, but to the incompetency of the witness Hunsicker himself. From the introduction of the evidence generally, and the examination and cross-examination of other witnesses during the trial, we think this error in admitting Hunsicker's testimony is insufficient to authorize a reversal of the judgment.

The defendant further contends that the court erred in instructing the jury concerning the inconvenience of crossing and recrossing the defendant's road from the public highway. The defendant cannot complain of the instructions given, for they are on the same line as those asked by the defendant in the trial. Their eighth and ninth requests were as follows: "(8) If you find that the plaintiff has sustained any damage on account of the danger or inconvenience of crossing the track of the defendant's railroad, I instruct you to award him on that account only such damage as may arise from traveling between the plaintiff's lands and the established county road by the nearest and most practicable route. (9) The plaintiff can recover in this action only such damages as are peculiar to himself and the land in controversy, and nothing on account of any injury or inconvenience which is common to the plaintiff and his land, and all the other land-owners and lands lying between Solomon City and Sand Springs, south of the railroad of the defendant and north of the Smoky Hill river." The court instructed the jury, of its own volition, that the jury could not take into consideration any thing about the Union Pacific railroad as to the damages he sustained by reason of the increased inconvenience and danger in crossing the tracks, and that he was

entitled to recover only such damages as were peculiar to himself and to the land in controversy, and that they were not to take into consideration any damages that he might have sustained in common with the public. The instructions given by the court were substantially on the same line as those asked by the defendant, and he is precluded from making objection to them for that reason. The other errors complained of require no mention.

We, therefore, recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

1. **Eminent domain — entire tract.** — As to what constitutes the "entire tract" when part is taken see *Beekman v. Jackson County*, 1 Am. R. R. & Corp. Rep. 665, and note. We also refer to the following recent decisions. Where a number of tracts of land as described in the government sub-divisions are used together as one farm and a railroad is laid through one or more of the tracts, the damage to the whole farm should be considered. *North-eastern Neb. Ry. Co. v. Frazier* (Neb.), 40 N. W. Rep'r, 604. But where the parcels composing a farm are separated by intervening lands, over which the owner has no private right of way, such separate parcels cannot be considered as forming an entire tract for the purposes of assessing damages. *Cameron v. Chicago, etc., Ry. Co.* (Minn.), 43 N. W. Rep'r, 785. Where a part of a farm which is separated from the remainder by a boundary line only, has been temporarily leased, the damages or benefits thereto may still be considered. *Baltimore, etc., R. Co. v. Springer* (Penn.), 13 Atl. Rep'r, 76. Where a lot adjoining a railroad is used for storing and loading marble in connection with a marble quarry a mile distant, the two cannot be considered as forming a single or entire property for the purpose of assessing damages when part of the lot is taken. *Potts v. Pennsylvania, etc., R. Co.* (Penn.), 13 Atl. Rep'r, 291.

2. **Opinion evidence in condemnation proceedings.** — The authorities are generally agreed that witnesses who are shown to possess the requisite knowledge and experience may give their opinions as to the value of the property in question. *St. Louis, etc., R. Co. v. Anderson*, 39 Ark. 167; *Texas, etc., R. Co. v. Kirby*, 44 Ark. 103; *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63; *Cincinnati, etc., R. Co. v. Mims*, 71 Ga. 240; *Illinois etc., R. Co. v. Van Horn*, 18 Ill. 257; *Johnson v. Freeport, etc., Ry. Co.*, 111 Ill. 413; *Chicago, etc., R. Co. v. Blake*, 116 Ill. 163; *Evansville, etc., R. Co. v. Cochran*, 10 Ind. 560; *Indianapolis, etc., R. Co. v. Pugh*, 85 Ind. 279; *Winkelman v. Des Moines, etc., R. Co.*, 62 Iowa, 11; *Pingree v. Cherokee, etc., R. Co.* (Iowa), 43 N. W. Rep'r, 235; *Kansas Central Ry. Co. v. Allen*, 24 Kans. 33; *Central Branch U. P. R. Co. v. Andrews*, 37 Kans. 162; *Snow v. Boston & Me. R. Co.*, 62 Me. 230; *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115; *Pinkham v. Chelmsford*, 109 Mass. 225; *Sexton v. North Bridgewater*, 116 Mass. 200; *Hawkins v. Fall River*, 119 Mass. 94; *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 127; *County of Blue Earth v. St. Paul & Sioux City R. Co.*, 28 Minn. 503; *Sherman v. St. Paul, etc., R. Co.*, 30 Minn. 227; *Hos-*

her v. Kansas City, etc., R. Co., 60 Mo. 303; Randall v. Pacific R. Co., 65 Mo. 335; Springfield, etc., R. Co. v. Calkin, 90 Mo. 538; Republican Valley, etc., R. Co. v. Arnold, 13 Neb. 485; Same v. Linn, 15 Neb. 234; Blakely v. Chicago, etc., R. Co., 25 Neb. 207; Matter of Utica, etc., R. Co., 56 Barb. 456; Matter of City of Rochester, 40 Hun, 588; Cleveland, etc., R. Co. v. Ball, 5 Ohio St. 568; Pennsylvania, etc., R. Co. v. Bunnell, 81 Penn. St. 414; Pittsburgh, etc., R. Co. v. Robinson, 95 Penn. St. 426; Tingley v. Providence, 8 R. I. 493; Washburn v. Milwaukee, etc., R. Co. 59 Wis. 364; Lehigh Valley Coal Co. v. Chicago, 26 Fed. Rep'r, 415.

The authorities are conflicting as to whether a witness may state the amount of damage done to property by a railroad or other work of a public nature. Such opinions were held competent in the following cases: Texas & St. Louis Ry. Co. v. Kirby, 44 Ark. 103; Fayetteville, etc., R. Co. v. Combs, 51 Ark. 324; Hays v. Ottawa, etc., R. Co., 54 Ill. 378; Galena, etc., R. Co. v. Haslam, 73 Ill. 494; Keithsburg, etc., R. Co. v. Henry, 79 Ill. 290; Chicago v. McDonough, 112 Ill. 85; Spear v. Drainage Comrs., 113 Ill. 632; East St. Louis v. O'Flynn, 19 Ill. App. 64; Snow v. Boston & Maine R. Co., 65 Me. 230; Dwight v. County Comrs., 11 Cush. 201; Shaw v. Charleston, 2 Gray, 107; Shattuck v. Stoneham Branch R. Co., 6 Allen, 115; Swan v. County of Middlesex, 101 Mass. 173; Simmons v. St. Paul, etc., R. Co., 13 Minn. 184; Colvill v. St. Paul, etc., Ry. Co., 19 Minn. 283; Lehmicke v. St. Paul, etc., R. Co., 19 Minn. 464; Curtis v. St. Paul, etc., R. Co., 29 Minn. 28; Sherwood v. St. Paul, etc., R. Co., 21 Minn. 127; Sherman v. St. Paul, etc., R. Co., 30 Minn. 237; Sigafos v. Minneapolis, etc., Ry. Co. (Minn.), 88 N. W. Rep'r, 627; Rochester, etc., R. Co. v. Budlong, 6 How. Pr. 467; 10 How. Pr. 289; Matter of Utica, etc., R. Co., 56 Barb. 456; Hine v. New York El. R. Co., 36 Hun, 293; Portland v. Kamm, 10 Or. 383; White Deer Creek Improvement Co. v. Sassaman, 67 Penn. St. 415; Pittsburgh, etc., R. Co. v. Robinson, 95 Penn. St. 426; Telephone Telegraph Co. v. Forke, 2 Tex. App. Civ. Cas. 318; Railroad Co. v. Foreman, 24 W. Va. 662; Snyder v. Western Union R. Co., 25 Wis. 60; Parks v. Wisconsin Central R. Co., 33 Wis. 413; Wooster v. Sugar River Valley R. Co., 57 Wis. 311; Neilson v. Chicago, etc., R. Co., 58 Wis. 516; Washburn v. Milwaukee, etc., R. Co., 59 Wis. 364; Leavenworth, etc., Ry. Co. v. Paul, 28 Kans. 816; Republican Valley, etc., R. Co. v. Arnold, 13 Neb. 485; Same v. Hays, 13 Neb. 489; Wichita, etc., R. Co. v. Kuhn (Kans.), 16 Pac. Rep'r, 75; S. C., 17 Pac. Rep'r, 322; Ball v. Keokuk, etc., R. Co. (Iowa), 37 N. W. Rep'r, 10.

Such opinions are held incompetent in the following decisions: Montgomery, etc., R. Co. v. Varner, 19 Ala. 185; Alabama, etc., R. Co. v. Burnett, 42 Ala. 88; Brunswick, etc., R. Co. v. McLaren, 47 Ga. 546; Evansville, etc., R. Co. v. Fitzpatrick, 10 Ind. 120; Same v. Stringer, 10 Ind. 551; New Albany, etc., R. Co. v. Huff, 19 Ind. 315; Hagaman v. Moore, 84 Ind. 496; Yost v. Conroy, 92 Ind. 464; Dalsell v. Davenport, 12 Iowa, 437; Prosser v. Wapello, 18 Iowa, 262; Harrison v. Iowa Midland R. Co., 36 Iowa, 823; Parsons Water Co. v. Knapp, 38 Kans. 752; Fremont, etc., R. Co. v. Whalen, 11 Neb. 585; Burlington, etc., R. Co. v. Schluntz, 14 Neb. 421; Same v. Beebe, 14 Neb. 463; Atlantic, etc., R. Co. v. Campbell, 4 Ohio St. 588; Cleveland, etc., R. Co. v. Ball, 5 Ohio St. 568; Tingley v. Providence, 8 R. I. 493; Brown v.

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Providence, etc., R. Co., 12 R. I. 238. And see Matter of New York, etc., Ry. Co., 29 Hun, 609; Ferrand v. Chicago, etc., Ry. Co., 21 Wis. 435; Stowell v. Milwaukee, 81 Wis. 523.

The former cases undoubtedly represent the more correct view. The damages to property by a public work can only be arrived at by ascertaining its value before and after the construction of the work. Opinions as to such values are clearly competent as already shown. But when the values before and after the injury have been shown, the damage becomes a mere matter of subtraction. The true rule is that a witness may give his opinion as to the amount of damage when the question relates simply to a difference in values, and opinions are admissible to prove the values. Rochester, etc., R. Co. v. Budlong, 10 How. Pr. 289, 293; Fayetteville, etc., R. Co. v. Combs, 51 Ark. 324.

BAIN, STATE TREASURER, v. RICHMOND & DANVILLE R. CO.

(11 S. E. R. 311; 105 N. C. 363.)

1. TAXATION. ROLLING STOCK. INTERSTATE COMMERCE. The rolling stock of a non-resident railroad corporation which has its *situs* in North Carolina, and is constantly employed there, is subject to taxation in that state.

2. But rolling stock belonging to such company, employed in interstate commerce, is not taxable in the state, though it may constantly have a large amount in value of such stock in the state.

Attorney-General and *R. H. Battle* for appellant. *D. Schenck* and *C. M. Busbee* for appellee.

MERRIMON, C. J. The plaintiff is the treasurer of North Carolina. The defendant is a corporation of the state of Virginia, and has a lease of the railroad of the North Carolina Railroad Company, a corporation of this state; and it does the business of transportation in, through and across this state from the state of Virginia and other states to the state of South Carolina and other states. The purpose of this action is to recover the sum of \$350 as taxes alleged to be due this state from the defendant, and for costs. The following are the facts found by the court below, and its judgment thereupon: (1) The Richmond and Danville Railroad Company was on June 1, 1888, the owner of \$17,500 worth of rolling stock, to-wit, four switching engines and one coach, which were on June 1, 1888, used exclusively in North Carolina, but owned in Virginia, and which the company never at any time recall. (2) Upon all the rolling stock of the Rich-

mond and Danville Railroad Company the company is assessed for taxation, and does pay taxes in Virginia. (3) The rolling stock of the North Carolina Railroad Company is used exclusively in North Carolina; and upon all this rolling stock, of the assessed value of \$125,000, taxes are assessed and paid in North Carolina by the Richmond and Danville Railroad Company, the lessee. (4) The board of appraisers and assessors of the North Carolina railroad made the assessment, as set out as an exhibit to complaint, of \$175,000 upon the rolling stock of the Richmond and Danville Railroad Company in use in North Carolina on June 1, 1888. (5) On June 1, 1888, there was in use on the North Carolina railroad, leased by the Richmond and Danville Railroad in North Carolina, rolling stock passing through the state to the value of \$175,000. Such rolling stock was owned by the Richmond and Danville Railroad Company; and the trains in which said rolling stock was used were made up outside of North Carolina, and went on through to the state of South Carolina. Upon this state of facts his honor ruled that the defendant company was liable to pay taxes to the state upon \$175,000, on the engines and coach used exclusively in North Carolina, and was not liable to pay upon \$157,500 the remainder, used in interstate commerce. Therefore, it is adjudged that the plaintiff recover of the defendant the sum of thirty-five dollars, and interest from July 1, 1888, and costs."

The power and right of the state to tax property of non-residents, whether these be natural or artificial persons, having its *situs* within the state for the purposes of business, convenience, or pleasure of the owners thereof or others, is too well settled to admit of serious question. This important right of the state is surely founded upon the just ground that such property has the protection, advantage and benefit of the laws of the state; and it ought, on that account, to be required to contribute as taxes its fair share towards the support of the government whose benefits extend to it, not merely casually, but regularly and continuously, while it continues to be so located, as to other like property of residents of the state. Upon principles of common justice, every property-owner should contribute to the support of the government that protects and renders his property valuable and useful his fair proportion of money as a consideration there-

for, unless for some proper cause he is excused from doing so. *Alvany v. Powell*, 2 Jones Eq. 51; *Redmond v. Commissioners*, 87 N. C. 122, and numerous cases there cited; *Worth v. Commissioners*, 90 N. C. 409; *Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct. Rep'r, 826; *Thomson v. Railroad Co.*, 9 Wall. 479; *Railroad Co. v. Peniston*, 18 Wall. 5; *Telegraph Co. v. Texas*, 105 U. S. 460; *Telegraph Co. v. Massachusetts*, 125 U. S. 530; 8 Sup. Ct. Rep'r, 961; *Leloup v. Port of Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep'r, 1380. If the state were absolutely sovereign in all respects, it might tax property coming into it temporarily from another state for the purposes of trade, or property passing across its territory from one state to another or other states in the course of trade, travel and commerce. It might tax such trade and travel, in the discretion of its legislature. But, as a member and constituent part of the federal Union, it does not possess unlimited powers of taxation as to all property, matters and things that might otherwise be deemed and made subjects thereof. It and its authorities, including its courts of justice, are bound by that constitution; and it is its and their duty to observe, administer and enforce its provisions in proper cases and connections — as much so as its own constitution and laws. Indeed, the constitution of the United States is a part of the organic law of this state; and, in principle and theory, there is not, and cannot be, any conflict between the constitution and laws of the United States and the same of this state. If conflict, in fact, exists in any respect, as, unhappily, is sometimes the case, it is so because those who determine what the law is, administer and enforce it, are ignorant of or misapprehend its true meaning and application, or willfully disregard and disobey it.

A leading and very important purpose of the federal Union was to establish and secure the freedom of trade and commerce, both foreign and domestic, and particularly, for the present purpose, between and among the several states comprising it. To this end, it is provided in its constitution (art. 1, § 8, par. 3) that "the congress shall have power * * * to regulate commerce with foreign nations and among the several states, and with the Indian tribes." The power thus conferred is indefinite as to its scope, and capable of very latitudinous interpretation and exercise, particularly as it is part of the organic law, and the subject

to which it relates is one of great breadth and compass. It is difficult to determine its just limit in many respects ; but it should receive a reasonable interpretation, such as will effectuate the purpose contemplated, trenching as little as practicable upon the powers, rights and convenience of the states. Very certainly the provision implies that congress should regulate such commerce, and the states shall not ; that congress shall do so effectually, in such way and by such means as will secure, promote and encourage the same, and that the states shall not, if disposed to do so, interfere with, destroy, hinder or delay the same or divert it in any way, by any legal constraint, for their own advantage, otherwise than, to a very limited extent, as allowed by the constitution. Hence, it is settled that a state cannot tax commerce, trade, travel, transportation or the privilege to carry on and conduct the same, or the vehicles, means and appliances employed and used in connection therewith, coming into that state from another temporarily, however frequently, and returning to such other state ; nor can it tax such commerce, or such incidents thereto, passing across it from another or other states to another or other states, however often this may be done. And the reason is that to so tax such commerce, and the incidents thereto, including such means of transportation, would tend directly, and have the effect, in a greater or less degree and extent, to interfere with the freedom of commerce among and between the people of the states. It would have the certain effect to embarrass, hinder and delay the free course of such trade. If a state could thus tax such commerce at all, it might, in its discretion, for its own benefit and advantage, tax it so heavily as to practically destroy it within its own borders, and in possible cases prevent it from passing freely into other states. Moreover, if one state might tax it, every state through which it passed might do so likewise ; and thus the power of congress to regulate interstate trade and commerce would be nugatory, and a sheer mockery. It is clear that a state has no such power, and the supreme court of the United States has authoritatively so decided, directly and in effect, in many cases. *Hays v. Steamship Co.*, 17 How. 596 ; *Morgan v. Parham*, 16 Wall. 471 ; *Ferry Co. v. Pennsylvania*, 114 U. S. 196 ; 5 Sup. Ct. Rep'r, 826, and numerous cases there cited ; *Pickard v. Car Co.*, 117 U. S. 34 ; 6 Sup. Ct. Rep'r, 635 ;

Leloup v. Port of Mobile, 127 U. S. 640; 8 Sup. Ct. Rep'r, 1380. The statute (Acts N. C. 1887, chap. 137, §§ 44-51) properly interpreted, does not, and was not intended to, embrace and tax the property of the defendant put in question by this appeal. It had reference to, and embraced property of, corporations, whether resident or not, whose property was situated — had a *situs* — in this state, and was thus subject to be taxed. But the property in question was not, in a legal sense, located — situated — in this state. It had no *situs* here. It was the property of a non-resident corporation, employed and used by it, constantly, for the purposes of transportation, in the course of the conduct of interstate trade and commerce coming into and passing across this state from another and other states to and into another and other states. It was not stationary, but constantly *in transitu* from one state to another. The mere fact that property of the defendant of the value mentioned was continuously within the state did not give it a *situs* here. It was continually changing and *in transitu* in the course of interstate commerce. It was so continuously in the state, day and night, because of the great volume of trade and travel passing over the defendant's road into and across this state, going to other states.

It is true, as suggested on the argument, that such property receives protection from this state, and has benefit of its laws; but, nevertheless, it is not the subject of taxation, because the constitution of the United States will not, as we have seen, allow it to be made such subject.

Judgment affirmed.

CONGER V. NEW YORK, W. S. & B. R. Co.

(23 N. E. R. 963; 120 N. Y. 29.)

1. RAILROAD COMPANIES. SPECIFIC PERFORMANCE OF AGREEMENT TO LOCATE STATION. A railroad company, in consideration of the grant of a right of way over certain premises, agreed with the owner to establish a station thereon and to stop thereat five express trains each way daily. On a bill for the specific performance of this agreement it was found that the place was in a mountain gorge, near a sharp curve and on a steep grade; that a station there would accommodate but few, and would greatly delay and inconvenience the

public. Held, that specific performance should not be granted but plaintiff left to his remedy at law.

Clarence R. Conger for appellants. *Calvin Frost* for respondent.

HAIGHT, J. This action was brought to compel a specific performance of a contract. The Jersey City and Albany Railway Company was incorporated for the purpose of constructing and operating a railroad from Fort Montgomery, in the county of Orange, to a point on the Hudson river opposite to the city of New York. As such incorporation it entered into a written agreement with one Catherine A. Hedges, the plaintiff's grantor, in and by the terms of which she gave to the company a right of way across her premises in Rockland county upon certain conditions, one of which was that the company should locate a station in the gorge commonly known as the "Long Clove," and stop thereat five express trains each way, daily. Subsequently the Jersey City and Albany Railway Company was consolidated with the North River Railway Company, under the name of the North River Railroad Company, and that company was consolidated with the defendant, which was incorporated for the purpose of constructing and operating a railroad from the New Jersey state line, through the state of New York, to the city of Buffalo. The defendant has entered upon the lands of the said Catherine A. Hedges, and constructed its road-bed across the same, but it has not constructed any station thereon in the Long Clove gorge, or stopped any of its express trains thereat. The trial court has found as facts that a suitable station for the accommodation of passengers, and the receipt and delivery of freight, at the Long Clove gorge, could be built by the defendant only at a considerable expense, because of the nature of the ground at that point; that the place where the plaintiffs demand that the station be located is near the mouth of a long tunnel, and at a sharp curve in the defendant's railroad, upon the side of a steep mountain approached by steep grades in both directions; that it is sparsely settled, and if a station were established there it would be of no use to the public; that very little, if any, benefit would result to the plaintiffs, by the erection of a station, or the stoppage of the trains thereat; that the public convenience would not be promoted, but the public travel would be delayed; and, as a conclusion of law,

that a specific enforcement of the agreement would work hardship and injustice to the defendant, and such enforcement will not subserve the ends of justice; that specific performance should be denied, and the plaintiffs left to their action for damages for a breach of the contract. The evidence sustains the findings of the trial court, which have been affirmed by the general term. The questions for our consideration are, therefore, narrowed to a determination as to whether the conclusions of law reached are justified under the findings of fact.

It has been the well-settled doctrine of this court that the specific performance of a contract is discretionary with the court, and that performance will not be decreed where it will result in great hardship and injustice to one party, without any consideration, gain or utility to the other, or in a case where the public interest would be prejudiced thereby. *Clarke v. Railroad Co.*, 18 Barb. 350; *Trustees v. Thacher*, 87 N. Y. 311-317; *Murdfeldt v. Railway Co.*, 102 N. Y. 703; 7 N. E. Rep'r, 404; *Day v. Hunt*, 112 N. Y. 191-195; 19 N. E. Rep'r, 414.

As we have seen, the Long Clove gorge is located upon the side of a steep mountain, in a sparsely-settled district, and is approached by a steep grade, and that a passenger station, with an approach thereat, could be constructed only at a considerable expense. These are reasons worthy of consideration, but, if there were no others, the trial court might not have deemed them sufficient to refuse specific performance. But they are followed by another, which gives additional force and weight, and that is that the public travel will be delayed by the stoppage of the trains, and that the public convenience will not be promoted. The defendant is a corporation organized under the laws of the state, and is a common carrier of passengers and freight. Its duties are largely of a public nature, and it is bound to so run its trains and operate its road as to promote the public interest and convenience, and, in view of the fact that but little if any benefit would result to the plaintiffs by the erection of a station and the stoppage of trains thereat, as found by the trial court, it appears to us that that court properly refused to decree specific performance and remanded the plaintiffs to their action for damages.

The judgment should be affirmed, with costs.

All concur, except Brown, J., not sitting.

Specific performance of agreement to build depot.—Apart from considerations of public policy, it is generally held that the agreement of a railroad company to locate and construct a depot, in consideration of the grant of the right of way or other valuable consideration, will be specifically performed, *Hubbard v. Kansas City, etc., R. Co.*, 68 Mo 68; *Lawrence v. Saratoga Lake Ry. Co.*, 86 Hun, 467; *Gray v. Burlington, etc., R. Co.*, 87 Iowa, 119. It is no answer to such a suit that a specific description of the thing to be done is not contained in the contract to be performed. That which is reasonably suitable under the circumstances to answer the purpose intended, is what the contract implies. *Gray v. Burlington, etc., R. Co.*, 87 Iowa, 119; *Lawrence v. Saratoga Lake R. Co.*, 86 Hun, 467. But, see *Wilson v. Northampton, etc., Ry. Co., L. R.*, 9 Ch. 279.

HOOKER V. CHICAGO, M. & ST. P. R. Co.

(44 N. W. R. 1085; 76 Wis. 542.)

1. RAILROAD COMPANIES. STATUTE REGULATING SPEED. A statute of Wisconsin provides that, in all cities and villages, no train or locomotive shall go faster, until after having passed all the traveled streets thereof, than at the rate of six miles an hour. Held, to prohibit running faster than the above rate, after having entered a city and before reaching any traveled street.

2. PERSONS ON TRACK. NEGLIGENCE. Plaintiff's daughter, a child under five, in charge of one Mrs. D., while crossing a bridge forming part of defendant's road, was run over and killed by a train running at the rate of twenty-five miles an hour in violation of the above statute. If it had been running at the statutory speed, the train could have been readily stopped before reaching the deceased, after they were seen by the engineer. Held, that there was a clear case of negligence on the part of the company.

3. PERMITTING PUBLIC TO USE BRIDGE. The evidence showed that the people residing in the vicinity of the bridge had been accustomed to use it without objection or warning by the company. Held, that the deceased were not trespassers but licensees.

4. STATEMENTS BY ENGINEER. RES GESTÆ. A witness testified that after the train was stopped and the engineer was walking back to the bridge, he said in answer to a question: "They had whistled enough for them." Held, competent as part of the *res gestæ*.

5. IMPEACHING EVIDENCE. NEW TRIAL. A new trial will not be granted on account of the discovery of impeaching evidence.

6. IMPUTED NEGLIGENCE. The court decline to determine whether the negligence of Mrs. D. could be imputed to the child, as it holds that the jury must have found that she was not guilty of negligence.

John T. Fish and Burton Hanson for appellant. *Harlow Pease* for respondent.

ORTON, J. The facts of this case are briefly as follows: On
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the afternoon of the 14th day of September, 1886, the wife of the plaintiff, and mother of the little girl, Catharine, deceased, let her go with her little playmate, Edith Jones, to the house of one Mrs. Dacey, to spend the afternoon. Mrs. Dacey lived alone, about three hundred and twenty-five feet south of the railway bridge, across the west branch of the Rock river, in the city of Waupun, and about one hundred feet east of the track. The bridge is one hundred and thirty-eight feet long, and seventy-six feet of it, over the water, was inclosed on both sides, and persons going over it had to walk on the ties. It is one thousand and fifty-six feet south of the north boundary of the city, and about the same distance north of the depot. The road runs north and south through the city, but about six hundred feet north of the bridge it curves toward the east. From a point one thousand one hundred and sixty-eight feet north of the bridge, on the west side of the track, at the height of an engine cab, the whole track could have been plainly seen, southward through the bridge, and to Main street beyond, without any obstruction whatever. Mrs. Dacey was a careful, prudent, cheerful and respectable woman of mature years, and very fond of children, and had raised several of her own. The little girl, Catharine, was under five years of age. Mrs. Dacey had been walking about with the little girls, trying to entertain them, and they had been throwing pebbles into the water. They came on the bridge at the south end, and walked across to the other end, and then turned around and walked back, as if returning to Mrs. Dacey's house. When nearly through the inclosed part of the bridge, they first heard and saw the train coming toward them, with great speed. Mrs. Dacey appeared to have been paralyzed with fear, and, when they got about three feet from the end of the inclosed part of the bridge, the train passed over and killed all three of them. The road from the north for a considerable distance, and to within a mile of the city, had a descending grade. The train consisted of ten freight and three passenger cars, with the tender and engine. The testimony tends to prove that the train had been running at the rate of forty miles an hour, until it had approached the city, and that afterward, when within the city limits, it was run at the rate of from twenty-five to thirty miles an hour; and that the engineer saw these persons on the bridge when the train

had approached a point nine hundred and sixty-five feet from them, and might have easily stopped the train before it had reached the bridge, even if it had been running at six miles an hour. He testified that he could stop the train, within six hundred or seven hundred feet, if it had been running at the lawful speed of six miles an hour, and that he might have stopped it, as it was then running, within one thousand feet and the evidence was that he might have seen these persons at a point over one thousand two hundred feet from them. The train was behind time, which may account for the fast running. The testimony tended to prove, also, that the bridge had, for many years, and up to the time of the accident, been habitually and constantly used, by men, women and children, going back and forth in that part of the city, as a foot pathway, without any objection, notice or warning by the company, that it should not be so used until after this accident. As soon as the engineer saw these persons on the bridge, he sounded the danger signal, and the brakes were set, but the air-brakes were out of order, and were not used. The plaintiff sues as administrator for his deceased child. The jury rendered a verdict for the plaintiff at \$500, and the defendant's counsel moved to set it aside, and for a new trial on the minutes of the court, and on affidavits showing that one of the plaintiff's witnesses had testified in the trial to that which was not true. The motion was denied.

We will consider the points made by the learned counsel of the appellant in their order :

1. That the court should have directed a verdict for the appellant. This raises the question of the legal effect of the testimony. The learned counsel of the appellant contends that there is no law that prohibited the running of the train at a rate of speed exceeding six miles per hour, after it had entered the city, and until it reached the bridge, because it passed over no traveled streets. Section 1809, Revised Statutes, provides that, "in all cities and villages, * * * no train or locomotive shall go faster, until after having passed all the traveled streets thereof, than at the rate of six miles per hour." This train had entered the city from the north, and was going south. It had not yet come to a traveled street, and, of course, had not passed all the traveled streets in that city. It was just about to come to a

traveled street, and if it was running, until then, twenty-five miles an hour, it could not stop or lessen the speed to six miles an hour, before it passed at least one traveled street at an unlawful rate of speed. The statute is well framed to prevent this. It must not run within the city at greater speed than six miles an hour, and the only exception is, "after having passed all the traveled streets thereof." The statute appears very plain. Was such an unlawful speed material in this case? We think it was clearly so. It is quite evident that if the train had been running only six miles an hour, after it had entered the city, this accident would not have happened. The train could have been easily stopped before it reached the bridge. Mrs. Dacey would have had time to get off the track after she saw it. This train, five hundred and fifty feet long, was running at an extraordinary and tremendous rate of speed. According to the testimony of the engineer himself, he could have stopped it, if it had been running at a lawful rate of speed. It is hard to believe that the engineer did not try his best to stop the train. And yet I have no doubt that there have been instances when the engineer did not do so, and was not guilty of any intentional wrong. The engineer does not like to stop his train when he sees a person on the track a considerable distance ahead. He expects that the danger signal will be sufficient. Such instances are not rare, and the person does get off in time, and no harm is done. It is not strange that this practice of taking the chances should become habitual. The engineer in this case no doubt did his best to stop his train, but he may not have tried to do so soon enough, at the tremendous rate of speed he was running. The negligence of the company seems to us to have been established beyond all doubt.

It is further contended, by the learned counsel, that Mrs. Dacey and the children were trespassers on the bridge. We think that there was evidence, which the jury might have believed, that the bridge had hitherto been habitually and constantly used as a pathway to and fro, by the people in that part of the city. Mrs. Dacey was using the bridge as a way through which to get home, and not for play, when the train came in sight. It is clear enough that she was a licensee in the use she made of the bridge, and that she was using it properly and lawfully. The negligence of Mrs.

Dacey will be considered hereafter. Aside from that, we think the evidence warranted the verdict.

2. Exception was taken to the testimony of the witness Gerrits, of what the engineer said about the accident, about as soon as he stopped his train, south of the bridge and north of the depot, or soon thereafter. The testimony was that when asked, "What have you been doing?" he looked up and said, "They had whistled enough for them." It seems that the engineer was going towards the bridge when this occurred. Whatever the jury might understand was meant by this expression, we are satisfied that it occurred near enough to the accident itself to be a part of the *res geste*, and admissible. *Felt v. Amidon*, 43 Wis. 467, and other cases cited in the brief of respondent's counsel.

3. The newly-discovered testimony to impeach Julius Timple, one of the plaintiff's witnesses, as a ground for a new trial, was upon the question of his experience and competency as a locomotive engineer, and to testify as an expert, and the falsity of his testimony as to how soon the train might have been stopped. It does not appear that the testimony of that witness conflicted materially with that of the engineer of the train, upon the real question whether the train might have been stopped before it reached Mrs. Dacey and the children, if it had been running at a lawful rate of speed. At all events, a new trial ought not to be granted on account of newly-discovered evidence of mere impeachment. *Bunn v. Hoyt*, 3 Johns. 255; *Shumway v. Fowler*, 4 Johns. 425; *Harrington v. Bigelow*, 2 Denio, 109; *Delaney v. Brunette*, 62 Wis. 615; 23 N. W. Rep'r, 22; *Schacherl v. Railway Co.*, 43 N. W. Rep'r, 837; *Jones v. Railway Co.*, 43 N. W. Rep'r, 1114. There was no abuse of the discretion of the court in refusing to grant a new trial for such cause. *Smith v. Champagne*, 72 Wis. 480; 40 N. W. Rep'r, 398.

The court was requested by the defendant's counsel to instruct the jury, and did so instruct them, and repeated it several times, that if Mrs. Dacey was guilty of a slight want of ordinary care, in going on the bridge with the children, under the circumstances, and that it contributed to, or was the proximate cause of, the death of the child Catharine, they should find for the defendant. The learned counsel of the plaintiff excepted to this instruction, and now asks this court to decide, in support of the judgment, that such in-

struction was erroneous. He contends that the negligence of the temporary custodian of the child ought not to be imputed to the child herself or to the plaintiff. This court has not yet decided that question. It has frequently held, however, that in such a case, where the child is so young as to be *non sui juris*, it is a material question whether the parent was or was not negligent in committing the child to such temporary custodian, and whether such custodian was of proper age and discretion to suitably care for it. There has been no occasion to go further, and decide the above question. *Hoppe v. Railway Co.*, 61 Wis. 357; 21 N. W. Rep'r, 227; *Dahl v. Railway Co.*, 62 Wis. 652; 22 N. W. Rep'r, 755; *Parish v. Eden*, 62 Wis. 272; 22 N. W. Rep'r, 399.

The jury considered the question of the negligence of Mrs. Dacey understandingly and fully, as it had been so often impressed upon them by the court, and must have found that she was guilty of no want of ordinary care that contributed to the death of the child. That was a question peculiarly within their province to decide, and their decision of it should be conclusive and a finality if the evidence was not such as to show that she was negligent beyond all question. *Randall v. Telegraph Co.*, 54 Wis. 140; 11 N. W. Rep'r, 419; *McNamara v. Clintonville*, 62 Wis. 207; 22 N. W. Rep'r, 472; *Hill v. Fond du Lac*, 56 Wis. 246; 14 N. W. Rep'r, 25; *Kaples v. Orth*, 61 Wis. 531; 21 N. W. Rep'r, 633; *Ferguson v. Railway Co.*, 63 Wis. 145; 23 N. W. Rep'r, 123. We cannot say from the evidence that Mrs. Dacey was guilty of any want of ordinary care in going upon the bridge with the children. She had lived near the railroad for several years, but she might not have remembered at what time the train was due, or she may have thought it had already gone by. What were the reasons that actuated her, if she had any beyond merely entertaining the children, we cannot know. If her negligence is to affect the rights of the plaintiff, it should certainly be very clearly proved. We think the jury were warranted in finding that she was not guilty of any want of ordinary care that contributed to the accident. It is, therefore, unnecessary to decide that she could not be chargeable with negligence in taking care of the child, even to support the judgment. The question is, therefore, hardly before us, or in such way as to be proper to decide it. The courts of the different states are in irreconcilable conflict on

the question, so that our decision of it will have to depend upon which side is the better reason, rather than upon the weight of authority. It is a question of considerable importance, and we will defer the decision of it until it becomes material in the case. The instructions of the court to the jury were very favorable to the appellant. They embraced all that ought to have been given of those that were requested. The circuit court committed no error of law that ought to reverse the judgment.

The judgment of the circuit court is affirmed.

Railroad companies — injuries to persons on track. — Persons trespassing upon a railroad track cannot recover for injuries received unless the same are due to the wanton or willful negligence of the company. *Roden v. Chicago, etc., R. Co.* (Ill.), 24 N. E. Rep'r, 425; *McAdoo v. Richmond, etc., R. Co.* (N. C.), 11 S. E. Rep'r, 316. The rule applies to children of tender years' as well as to adults. *Pennsylvania R. Co. v. McMullen* (Penn.), 19 Atl. Rep'r, 27; *Mitchell v. Philadelphia, etc., R. Co.* (Penn.), 19 Atl. Rep'r, 28.

Where a railroad track has been used as a foot-way for twenty years by people residing in the vicinity with the knowledge of the company, such persons are to be regarded as licensees, and it is the duty of the company, in operating its trains, to take notice that persons are liable to be on the tracks and to exercise care accordingly. In a case where a boy of twelve, who was walking on the track under such circumstances, was injured by a long freight train being backed along the track, the following instruction was held to be correct: "Parties managing moving trains must provide a careful lookout in the direction that the train is moving in places where people, and especially children, are liable to be upon the track. Where a train is being drawn by a locomotive, there is always a lookout, and means of giving notice and warning to travelers on the track, or in places of danger, of the approach of the train. When a train is being backed, then the train is in such a condition, or in such a position, that other means of warning are required by the law, and, as I have given out in the rule, there must be some lookout provided, so that in case parties, especially in localities where women and children are likely to be, where those parties are, they can be warned of approaching danger if they don't see it." *Whalen v. Chicago & N. W. Ry. Co.* (Wis.), 44 N. W. Rep'r, 849. In the same case it was also held, that though the plaintiff's conduct was such as in an adult would have constituted contributory negligence as matter of law, yet owing to the tender years of the plaintiff, the question was properly submitted to the jury.

A very similar case to the one reported will be found in *Southerland v. Wilmington, etc., R. Co.* (N. C.), 11 S. E. Rep'r, 189.

MCALLISTER V. CITY OF ALBANY.

(23 Pac. R. 845; 18 Or. 428.)

1. MUNICIPAL CORPORATIONS. INJURIES FROM EXCAVATIONS IN STREET. A municipal corporation, upon whom its charter imposes the duty to keep its streets in a reasonably safe condition for travel, is liable to persons for injuries caused by neglect to keep proper lights and guards at night around an excavation which it has authorized to be made in the street, although it has provided in its contract for such precautions with the contractor.

John Burnett and *Chas. Wolverton* for appellant. *J. K. Weatherford* and *D. R. N. Blackburn* for respondent.

LORD, J. This is an action to recover damages for injuries sustained by the plaintiff in consequence of a ditch dug across a certain street of said city for the construction of a sewer being left open, and without lights or guards, into which the plaintiff drove his team, and seriously injured himself and team. Among other defenses, the main one relied upon, and the only one necessary for us to decide, is that the defendant claims that the act occasioning the injury was caused by one Walter East, to whom the defendant had let a contract for the construction of a sewer, and that by the terms of said contract the said East was an independent contractor, and as such had the exclusive control of digging said ditch, and the direction and management of the laborers engaged in the work, and that the said contractor is alone liable, and that the plaintiff ought not to have or maintain an action against the defendant. Our inquiry, then, is reduced simply to this: Who is liable to the plaintiff for the injuries he had sustained — the contractor or the defendant?

No rule of law is better settled than that one who contracts with another for the performance of certain work is not liable for injuries produced to third persons by the negligence of the latter in the performance of that work when the relation of master and servant does not exist. Whether the rule applies to a municipal corporation owing a duty to the public to keep its streets safe for travel is a question which has been much discussed, and upon which there is some diversity of judicial opinion. To the general rule, as stated, the cases indicate that there are two exceptions: First, where the work is intrinsically dangerous to the public,

however skillfully performed, and the injury results directly from the work; in such case the liability cannot be avoided by contract, either by individuals or municipalities; and, second, where the law devolves the duty upon a municipal corporation to keep its streets in a safe condition for travel; in such case the authorities are not agreed, but the later and better-considered cases hold that the municipality is liable to persons for injuries arising from neglect to keep proper lights and guards around a ditch or excavation which it has caused to be made in the streets, and that such liability cannot be evaded by contract. Under the first exception Mr. Dillon, after stating that "the principle of *respondet superior* does not extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over the manner of doing the work under the contract" (section 1028) adds: "It is important to bear in mind that it does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed. In such a case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contracts." Dill. Mun. Corp., § 1029. As the case in hand comes under the second exception, further reference to the doctrine and cases under the first exception is not required.

It is unnecessary to recite the provisions of the charter at length; for it is not denied but that the charter of the defendant imposes the duty to keep its streets in a safe condition for travel, and that this obligation it assumed as a governmental agency. The charter not only imposes the duty, but it confers the necessary powers to carry out and effect the object for which the duty was imposed. Can it devolve the performance of this duty upon another, or can it evade it by contract or otherwise? It would seem, from the intrinsic nature of the duty confided to the city, that it could not delegate it to another, by contract or otherwise, so as to escape liability for negligence. Mr. Dillon says: "According to the better view, where a dangerous excavation is made, and negligently left open, without proper lights, guards or covering, in a traveled street or sidewalk, by a contractor under the corporation for building a sewer or other improvements, the corporation is

liable to a person injured thereby although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect." Dill. Mun. Corp., § 1027. In *Storrs v. Utica*, 17 N. Y. 104, it was held that a municipal corporation, owing to the public the duty of keeping its streets in a safe condition for travel, is liable to persons receiving injury from neglect to keep proper lights and guards at night around an excavation which it has caused to be made in the street, whether it has or has not contracted for such precautions with the persons executing the work. This is regarded as a leading case, and, like the case in hand, was an action against the city for negligence in suffering to remain open, and without proper lights and guards, at night, an excavation in the street made in the construction of a sewer, by reason of which negligence the plaintiff drove a wagon in the sewer, and was injured. After reviewing previous decisions of the court, Judge Comstock says: "But in *Blake v. Ferris*, 5 N. Y. 48, there was a difference in the facts which may justify the doubt I have suggested. In that case there was no complaint of negligence in the actual performance of the work. The ditch was carefully and skillfully dug. There was no careless projection of rocks against horses or travelers. The plaintiff's carriage and horses were driven into the ditch because it was not guarded at night. The cause of the accident, therefore, was not in the manner in which the work was carried out by the laborers. If it had been, their immediate employer, and he only, was liable for the injury. But, in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed. A ditch cannot be dug in a public street, and left open and unguarded at night, without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers or lets it out by contract?" The learned judge then proceeds: "The principles suggested become plain propositions in the case of a municipal corporation, which owes to the public the duty of keeping its streets in a safe condition for travel. * * * Although the work may be let out by contract, the corporation

still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement; and, if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take those precautions. The contractor may very properly be bound by his agreement not only to construct the sewer, but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot, I think, in this way, either avoid indictment in behalf of the public, or its liability to individuals who are injured." It is true the question is not entirely free from difficulty, and that the doctrine of *Barry v. St. Louis*, 17 Mo. 121, and *Painter v. Mayor*, 46 Penn. St. 213, relied upon and cited by counsel for the defendant, sustains their position; but we think the weight of authority, as well as sound reason and public policy, is against them. See *Storrs v. Utica*, 72 Am. Dec. 441, note; *Robbins v. Chicago*, 4 Wall. 657; *Water Co. v. Ware*, 16 Wall. 566; *St. Paul v. Seitz*, 3 Minn. 297 (Gil. 205); *Mayor v. McCary*, 84 Ala. 470; 4 So. Rep'r, 630; *Mayor v. O'Donnell*, 53 Md. 110; *Logansport v. Dick*, 70 Ind. 65; *Detroit v. Corey*, 9 Mich. 165; *Springfield v. Le Claire*, 49 Ill. 476, *Circleville v. Neuding*, 41 Ohio St. 465; *Nashville v. Brown*, 9 Heisk. 1; *Wilson v. Wheeling*, 19 W. Va. 323; 2 Dill. Mnn. Corp., §§ 1027, 1029, 1030. It is undeniable that the ditch dug across the street for the purpose of constructing the sewer was performed by the contractor under the express authority of the city. It let the contract to him to do the work as specified, and authorized him to excavate the street for that purpose, but the primary obligations to keep the street in a reasonably safe condition for travel devolved upon it by laws from which it could not divorce itself by contract. Such a ditch, left uncovered, and not properly lighted or guarded at night, across a public street, necessarily involved great danger and liability to injury to those who might have to travel it. The public have a right to assume that a duty imposed by law is performed, and that, in the absence of notice by lights or safeguards, such duty will be attended to,

and the street kept in a reasonably safe condition for travel. Such a duty cannot be evaded by contract. When the municipality makes a contract with a person for the construction of a sewer, which necessarily requires an excavation in the street that will render it unsafe and dangerous to travelers at night, unless protected by lights and guards, and such person, although an independent contractor, in the prosecution of the work leaves the street in an unsafe condition for travel, by reason whereof an injury is sustained by another, the corporation will be liable, without regard to the stipulations in the contract in respect thereto. While the defendant very properly has provided in its contract that the contractor shall, in the prosecution of the work, observe all necessary precautions against accidents from leaving the street in an unsafe condition, yet it cannot avoid liabilities for injuries resulting from negligence to observe these precautions not caused by the plaintiff's want of ordinary care, and must see to it that such duty is fully performed, to avoid liability therefor. The judgment must be reversed, and the cause remanded for such further proceedings as may be necessary in accordance with this opinion.

GULF, C. & S. F. R. Co. v. LEVI.

(13 S. W. R. 191; 76 Tex. 337.)

1. COMMON CARRIERS. LIABILITY FOR DEPRECIATION IN PERISHABLE GOODS IN CONSEQUENCE OF DELAY. Where the transportation of a car-load of lemons was delayed for several days by the overpowering force of rioters and without fault of the railroad company, it is not liable for depreciation resulting from the perishable nature of the goods in consequence of such delay, if there was no neglect to bestow proper care upon the goods.

Shepard & Miller for appellant. *B. P. Ayres* for appellee.

STAYTON, C. J. A further consideration of this case induces us to believe that the former disposition made of it was erroneous, and the motion for rehearing is sustained. Appellee brought this action to recover damages resulting from delay in transporting a car-load of lemons, received by appellant from another railway company at Rosenberg Junction, to be transported to

Fort Worth. He alleged, if the lemons had been transported within a reasonable time, they would have reached Fort Worth on September 27, at which time they were then worth in the market \$12 per box, but that they were not delivered at Fort Worth until October 2, when they were worth in the market only \$4 per box, and that by reason of this delay he was damaged \$2,000, there being two hundred and fifty boxes. He further alleged that the lemons were shipped from New Orleans in a ventilated car, as was necessary for their preservation, but that while *en route* they were transferred from that to a close car, whereby they were caused to heat and rot, and that from this cause fifty boxes were lost, for which he asked \$600 as damages. He further alleged that he was compelled to assort the lemons after they were received at Fort Worth, which cost him fifty cents per box, and this he also sought to recover. The petition then proceeds as follows: "Wherefore plaintiff avers and charges that, by reason of said unreasonable delay in the transportation and delivery of said lemons as aforesaid, and the depreciation of the price thereof as aforesaid, and the transferring said lemons from said ventilated car to said close car as aforesaid, he has been damaged in the sum of two thousand seven hundred and twenty-five dollars," for which he prays judgment. Defendant answered by a general denial, and further specially pleaded as follows: "And for further and special answer the defendant says that, if it ever received the fruit described in plaintiff's petition, the same was received by it at Rosenberg Junction from the G., H. & S. A. Ry. Company, and was immediately forwarded from said station in said car in which the same had been delivered to defendant, without opening the same. That the said car-load of fruit was carried with speed and safety to the city of Temple, in Bell county, through which it had to pass to be delivered to plaintiff at Fort Worth. That said car, on its arrival at Temple, was taken from the train, and side-tracked by a mob of persons, who, at the time, were engaged in a riot in the said city of Temple, and in the removal and destruction of defendant's property, including its road-bed, rolling stock, freight, etc., at said place. That said rioters were in great force and number, and that it was impossible for defendant, with its agents and employees, to resist them, or dispossess them of defendant's property. That when

the plaintiff's fruit arrived at Temple in the said car the said rioters immediately stopped the train and car bearing the said fruit, and took possession thereof and out of the control of defendant with overpowering force and arms, and against its protest, and notwithstanding its strenuous and exhausting efforts to prevent the same. The said rioters uncoupled the cars, and forced said car of fruit upon a side track, where, by overwhelming force and arms and violence, for the space of, to-wit, five days, they held possession of the same, refusing to permit the defendant to remove the same; and using force and violence to prevent defendant, and its agents and employes, from moving said car, as it then offered and wished; and was ready to do. Defendant says that it had remaining in its employ at and during said time a sufficient number of competent employes, who would have moved its trains and carried said car of fruit and other freight, had it not been prevented by the force and violence herein charged. Defendant made every possible effort to resume control of its property, and to move its said trains, and ship the car bearing plaintiff's fruit, and through its manager and agents appealed to city, county and state authorities and officers for assistance and force to control said riot, and the prevailing unlawful force, and to assist defendant to repossess itself of its property, and to pursue its lawful business. But defendant says that neither the city, county nor state officers and authorities were able to furnish sufficient force to subdue said riot, and dispossess said rioters, and drive them from the occupation of defendant's property. That this state of affairs existed for the space of, to-wit, five days, during which the plaintiff's fruit was in the control and in the possession of said rioters, and could not be handled or transported by defendant. That immediately after the cessation of said riot, and the dispersion of said rioters, which occurred at the end of, to-wit, five days, the defendant immediately recovered its property and freight, and took possession of said car, and, as soon as it was possible transported the same to its destination, namely, the city of Fort Worth, in Tarrant county, where it delivered the same at once to plaintiff. Wherefore defendant says that it has not been guilty of any negligence in and about said transportation of said car, and said delay was not due to the negligence of its duties by defendant, but solely and wholly and entirely to the act of the said

rioters and unlawful persons, and to the inability of the peace-officers of the city of Temple and county of Bell and state of Texas to disperse the said rioters, and restrain them from acts of violence, and permit the defendant to pursue its ordinary and peaceful avocation. And all this the defendant is ready to verify, and prays judgment." The plaintiff filed a general demurrer to this plea as setting up no lawful defense, which was sustained by the court. There was a judgment for the plaintiff, from which this appeal is prosecuted.

From the statement it will be seen that plaintiff based his claim for damages mainly on the ground that there was an unreasonable delay in the transportation of the lemons. If a defense to a claim for damages resulting from such a cause, other than inevitable accident or the act of God, can prevail, there can be no doubt that the answer sets up such a defense; and, if a good defense to any part of the plaintiff's claim was set up in the answer, it was error to sustain a demurrer to it. Under the statutes of this state the liability of the common carrier is that imposed by the rules of the common law. "He is liable not only for losses occasioned by secret theft or embezzlement, but for those inflicted by highway robbery, by the spoliations and outrages of mobs, rioters and insurgents. The most resistless and destructive conflagration, if occasioned by human agency, without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption." *Chevallier v. Straham*, 2 Tex. 122. For failure to carry and deliver, the carrier cannot excuse himself by reason of the fact that, through human agency, not under his control, this was prevented without fault on his part; but if the property be wholly lost or partially decayed through some inherent quality, without fault on the part of the carrier, this will excuse the failure safely to carry and deliver, for the operation of the laws of nature, working destruction or loss, furnish the same excuse as do tempest, lightning or other cause termed the "act of God." The reasons on which the common-law rule is based are thus stated by the English judges, whose knowledge of the ground-work of that system has never been questioned: In *Forward v. Pittard*, 1 T. R. 27, the reasons are thus stated by Lord Mansfield: "But to prevent litigation, collusion and the necessity of going into circumstances impossible to be unraveled, the law presumes

against the carrier, unless he shows that it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests. If an armed force came to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." The reasons are thus stated by Best, C. J., in *Riley v. Horne*, 5 Bing. 220: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies."

The same reasons do not apply when the thing is actually transported and delivered, although when delivered it may be greatly diminished in value by a fall in the market-price, or its value partially or entirely destroyed by reason of its inherent perishable nature, which has worked its partial or entire destruction while in transit. The rule is thus stated by a recent text-writer, in accordance with the view expressed by many others: "But the reasons upon which the extraordinary responsibility of the common carrier for the safety of the goods is founded do not require that the same responsibility should be extended to the time occupied in their transportation. The danger of loss by robbery or embezzlement, or theft by collusion and fraud on his part, has

no application when the mere time of the carriage is concerned. 'His first duty,' it is said, 'is to carry the goods safely, and the second to deliver them;' and it would be very hard to oblige a carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by the law in the contract to deliver; as Tindal, C. J., puts it, when he says: 'The duty to deliver within a reasonable time being merely a term ingrafted by legal implication upon the promise or duty to deliver generally.' In this respect, therefore, the common carrier stands upon the same ground with other bailees, and may excuse delay in delivery of the goods by accident or misfortune, although not inevitable or produced by the act of God. All that can be required of him in such an emergency is that he shall exercise due care and diligence to guard against the delay, and that, if it occur without his fault or negligence, he shall omit no reasonable efforts to secure the safety of the goods." Hutch. Carr., § 330. See, also, sections 292, 331, 335. Many cases are cited in the notes illustrative of the application of this rule, and we will briefly refer to some more recent. In *Haas v. Railroad Co.*, 35 Am. & Eng. Ry. Cas. 572; 7 S. E. Rep'r, 629, it was held that the company was not liable for loss resulting from "delay in delivering freight, caused by a strike of its employes, accompanied by intimidation and violence which could not be prevented or suppressed by either the company or the civil authorities." The loss in that case resulted from a fall in the market-price between the time the freight would ordinarily have been delivered, but for the obstruction, and the time when it was delivered. In the case of *Geismer v. Railway Co.*, 102 N. Y. 563; 7 N. E. Rep'r, 828, the same ruling was made, and the case distinguished from *Weed v. Railway Co.*, 17 N. Y. 362, and *Blackstock v. Railroad Co.*, 20 N. Y. 48. Case last cited, while affirming the rule quoted from *Hutchison on Carriers*, held that the simple fact that employes refused to work did not relieve the carrier from liability for failure to transport freight within the usual time. *Railroad Co. v. Hollowell*, 65 Ind. 189, was a case in which a carrier was sought to be held liable for failure to receive and transport freight within the usual time, and the company set up a defense similar to that urged in the case before us. After stating the rule as to

the liability of carriers for failure to deliver at place of destination, the court said: "But the strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation, and fail to deliver them at their destination, or when they are lost. In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract, or of his public duty as a carrier; and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob.' In *Railway Co. v. Hazen*, 84 Ill. 36, it was held competent for the carrier to show, in a suit for damages resulting from delay in the transit of freight, that the delay was caused solely by irresistible violence of men who were not in the employment of the company; and that when employes suddenly refused to work and were discharged, and others employed who were prevented by lawless violence of those discharged from doing duty, the company was not liable for delay thus caused. The case of *Railroad Co. v. Bennett*, 6 Am. & Eng. Ry. Cas. 402, decided by the supreme court of Indiana, affirms the rule asserted in *Railroad Co. v. Hollowell*, though the case was one under contract. Many cases might be cited in which carriers have been held not liable for injury resulting solely from delay, when this was shown to have been caused by misfortune or accident, not such as would relieve the carrier for loss of freight or failure to deliver it. We are of opinion that the answer excluded, presented a good defense to so much of the action as sought to recover damages for decline in market-price of lemons during time of transit.

It may be true that the answer does not present a defense arising from the fact that the lemons may have become less valuable while in transit by reason of material decay without fault on part of carrier; for there is no averment in the pleadings of either party that there was any diminution in value on that account. Plaintiff does allege that they heated, and on that account rotted to a given extent, but that was attributed to the wrongful act of defendant in putting them in an improper car. To the extent the

fruit may have deteriorated, on account of its perishable nature, while in transit, the facts pleaded would furnish a defense, if defendant bestowed upon it proper care; for in such case such a loss would be attributed solely to the delay which the answer excuses. For the error of the court in sustaining the demurrer the judgment will be reversed, and the cause remanded.

Duty of carriers in case of unavoidable delay.—In case of unavoidable delay in the transportation of freight, it is the duty of the carrier to exercise all reasonable care and diligence for the preservation of the property in his charge. *Bowman v. Teal*, 28 Wend. 806; *Vicksburg, etc., R. Co. v. Ragdale*, 46 Miss. 458; *Bennett v. Byram*, 38 Miss. 17; *Lowe v. Moes*, 12 Ill. 77; *Evans v. Hutton*, 5 Scott, 670.

HENKES V. CITY OF MINNEAPOLIS.

(44 N. W. R. 1026; 42 Minn. 530.)

1. MUNICIPAL CORPORATIONS. DUTY IN REGARD TO ICE ON SIDEWALKS.
The duty of a city to exercise reasonable care to keep its sidewalks in a safe condition does not extend to the removal of ice, which constitutes no other defect than slipperiness, there being no such accumulation of ice as to constitute an obstruction to travel, and no ridges or inequalities of such height, or lying at such inclination or angle, as would be likely to trip passengers or cause them to fall.

2. The duty of the city in this regard is not affected by the fact that the ice is in part the result of artificial causes, as of water escaping from hose, and not wholly of natural causes, such as the fall of rain.

Penney & Rogers for appellant. *Robert D. Russell* for respondent.

MITCHELL, J. The trial court was clearly right in dismissing the case on the ground that plaintiff had failed to establish a cause of action. The sum of all the evidence is that it was, and for some time had been, cold winter weather, and all the sidewalks in the city were covered with ice to a certain extent, so that "if a man didn't take care he was liable to slip and fall almost any place." About a week previous to the accident there had been a fire in the building abutting on the sidewalk where plaintiff sustained the injury, during which some water escaped from the hose, and ran upon the sidewalk, which was then covered with a coating of snow, which soon after froze, and remained in that

condition, without any thaw, until the time of the accident. The result was that the ice was a little thicker on this part of the sidewalk than elsewhere, and also a little rougher, because of the foot-prints of people who stepped in the wet snow at the time of the fire. But this extra thickness of ice was very small, and the roughness comparatively slight. As one witness put it, "there was no particular bad deep places, or big high ridges, to amount to any thing; there was no place you could stub your toe." Another witness said the best explanation he could give of the roughness spoken of was "if there was a coating of snow on this floor, and you were to step on it, it would make a dent in it; it was something like that. Of course, stepping into it, all water, and letting it freeze, it wouldn't remain as thick a dent as that." The witnesses describe the thickness of the ice as from two to two and a half inches. It is evident that neither the thickness of the ice, nor the roughness spoken of, was such as to form an obstruction to travel, or to render this part of the walk appreciably less safe than any other sidewalk. Neither was it any more slippery. Hence we can see no reason why it was any more the duty to remove this ice than it was to remove it from any other sidewalk. Appellant seems to argue that the fact that this ice was in part the result of an artificial cause, and not wholly of natural causes, such as the fall of rain or snow, makes a difference. But no such a distinction can be maintained. The liability of the city must rest upon some ground of fault or neglect on part of its officers who have charge of the streets, and such fault or neglect is no more involved in removing ice formed by water from hose than ice formed by rain from the clouds. *Nason v. City of Boston*, 14 Allen, 508. The only evidence as to how the accident occurred is that of the plaintiff himself, who says that, as he was traveling this sidewalk, "he slipped with his right foot, and fell over, and fell on his leg, and broke it." He does not claim that his foot struck an obstruction, or that any obstruction existed; simply that he slipped and fell, as he might have done on any sidewalk that was icy.

Upon such a state of facts, there can be no recovery against the city, unless it is the duty of such municipalities to keep their sidewalks clear of ice. In this climate such a thing would be a physical impossibility, and an attempt to do it would involve an amount

of expense that would bankrupt any city. No court has ever held that reasonable care required an attempt to do any such thing. An unbroken line of authorities hold that mere slipperiness of a sidewalk by either ice or snow is not a defect for which cities are liable; that their obligation to keep their streets in a safe condition does not extend to the removal of ice, which constitutes no other defect than slipperiness. Among the great number of cases to this effect are *Stanton v. Springfield*, 12 Allen, 566; *Nason v. City of Boston*, supra; *Stone v. Hubbardston*, 100 Mass. 49; *Smyth v. Bangor*, 72 Me. 249; *McKellar v. Detroit*, 57 Mich. 158; 23 N. W. Rep'r, 621; *Taylor v. Yonkers*, 105 N. Y. 202; 11 N. E. Rep'r, 642; *Chicago v. McGiven*, 78 Ill. 347; *Broburg v. Des Moines*, 63 Iowa, 523; 19 N. W. Rep'r, 340; *Cook v. Milwaukee*, 24 Wis. 270; 27 Wis. 192; *Bleakley v. Prescott*, 12 Ont. App. 637. In the present case, as already remarked, there was nothing but the slipperiness which caused the accident. There was no such accumulation of ice as to constitute an obstruction to travel; neither were there any ridges or irregularities of such height, or lying at such inclination or angle, as would be likely to trip passengers, or cause them to fall.

Order affirmed.

Liability for accidents by reason of snow and ice upon sidewalks and streets.—The mere fact that a sidewalk or way has become slippery by reason of snow or ice, will not render a municipality liable to one who is injured by reason of its slippery condition. *Sandolt v. Norwich*, 87 Conn. 615; *Seeley v. Litchfield*, 49 Conn. 184; *Cloughessey v. Waterbury*, 51 Conn. 406; *Chicago v. Hislop*, 61 Ill. 86; *Chicago v. McGiven*, 78 Ill. 347; *Broburg v. Des Moines*, 63 Iowa, 523; *Tripp v. Lyman*, 87 Me. 250; *Smith v. Bangor*, 72 Me. 242; *Stanton v. Springfield*, 12 Allen, 556; *Johnson v. Lowell*, 12 Allen, 572; *Nason v. Boston*, 14 Allen, 508; *Stone v. Hubbardston*, 100 Mass. 49; *Gilbert v. Roxbury*, 100 Mass. 185; *Keith v. Brockton*, 186 Mass. 119; *Evans v. Utica*, 69 N. Y. 166; *Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. Troy*, 108 N. Y. 567; *Kaveny v. Troy*, 108 N. Y. 571; *Harrington v. Buffalo*, 121 N. Y. 147; *Chase v. Cleveland*, 44 Ohio St. 505; *Mauch Chunk v. Kline*, 100 Penn. St. 119; *Cook v. Milwaukee*, 24 Wis. 270; S. C., 27 Wis. 191; *Ward v. Jefferson*, 24 Wis. 342; *Stilling v. Thorp*, 54 Wis. 538; *Hill v. Fond du Lac*, 56 Wis. 242; *Schroth v. Prescott*, 63 Wis. 652; *Grossenbach v. Milwaukee*, 65 Wis. 81; *Clark v. District of Columbia*, 8 Mackey, 79; *Ringland v. Toronto*, 23 U. C. C. P. 93; *Blakely v. Prescott*, 12 Ont. App. 637.

But if the accumulation is due to the fault of the municipality, either in negligently suffering water to escape upon the walk or in failing to remedy some defective or uneven condition of the same, or if the snow or ice is

allowed to remain an unreasonable length of time in a rough, uneven and dangerous condition, it will be liable. *Collins v. Council Bluffs*, 82 Iowa, 824; *Savage v. Bangor*, 40 Me. 176; *Luther v. Worcester*, 97 Mass. 268; *Stone v. Hubbardston*, 100 Mass. 49; *Street v. Holyoke*, 105 Mass. 82; *Billings v. Worcester*, 102 Mass. 329; *Pinkham v. Topsfield*, 104 Mass. 78; *Morse v. Boston*, 109 Mass. 446; *McAuley v. Boston*, 113 Mass. 503; *Loker v. Brookline*, 13 Pick. 348; *Whitman v. Groveland*, 131 Mass. 553; *Hutchins v. Boston*, 97 Mass. 272; *Fitzgerald v. Woburn*, 109 Mass. 204; *Stanton v. Springfield*, 12 Allen, 566; *Adams v. Chicopee*, 147 Mass. 440; *Hall v. Manchester*, 40 N. H. 410; *Todd v. Troy*, 61 N. Y. 506; *McLaughlin v. Corry*, 77 Penn. St. 109; *Hampson v. Taylor*, 15 R. I. 83; *Cook v. Milwaukee*, 24 Wis. 270; *Smith v. Chicago*, 88 Fed. Rep'r, 388; *Barton v. Montpelier*, 30 Vt. 650.

The liability is in all cases based upon negligence, and what will amount to negligence must depend in a large measure upon the circumstances of the particular case. *Congdon v. Norwich*, 37 Conn. 414; *Burr v. Plymouth*, 48 Conn. 460; *Landolt v. Norwich*, 37 Conn. 615; *Dooley v. Meriden*, 44 Conn. 117; *Cloughessey v. Waterbury*, 51 Conn. 405; *Boulder v. Niles*, 9 Col. 415; *Chicago v. Hislop*, 61 Ill. 86; *Hayes v. Cambridge*, 136 Mass. 402; *Rooney v. Randolph*, 128 Mass. 580; *Battersby v. New York*, 7 Daly, 16; *Taylor v. Yonkers*, 105 N. Y. 202; *Pomfrey v. Saratoga*, 104 N. Y. 459; *Foxworthy v. Hastings*, 25 Neb. 133; *Clark v. District of Columbia*, 8 Mackey, 79; *Stewart v. Woodstock, etc., Co.*, 15 U. C. Q. B. 427; *White v. Livingston*, 10 Cush. 259; *Mosby v. Troy*, 61 Barb. 550.

There can be no liability until a sufficient time has elapsed to enable the corporation, by the exercise of reasonable diligence, to remove or remedy the dangerous condition. *Cunningham v. St. Louis*, 96 Mo. 53; *Blakely v. Troy*, 18 Hun, 167; *Hayes v. Cambridge*, 136 Mass. 402; *Harrington v. Buffalo*, 121 N. Y. 147.

The fall of snow has been held to be sufficient notice to the municipality that a dangerous condition might ensue. *Foxworthy v. Hastings*, 25 Neb. 133. But in another case where the injury was received on January 28, and there was no direct evidence of how long the icy condition of the walk had existed, it was held that notice could not be inferred from proof that the temperature had been below freezing since January 17 and that there was a snow fall on January 22 and not again until after the accident. *Foley v. Troy*, 45 Hun, 396. Where the ice is formed from water escaping from a hydrant the fact that the hydrant had been leaking all winter was held sufficient to charge the municipality with notice. *Corbett v. Troy*, 53 Hun, 228.

If the accident is due in part to a defect in the walk and in part to ice for which the municipality is not responsible there may be a recovery. *Atchison v. King*, 9 Kans. 550; *Hampson v. Taylor*, 15 R. I. 83. So when the walk is laid with too much pitch or incline. *Haskell v. Des Moines*, 74 Iowa, 110; *Perkins v. Fond du Lac*, 34 Wis. 35; *Hill v. Fond du Lac*, 56 Wis. 242.

It is negligence for a person to attempt to pass over a walk which he perceives to be in a slippery condition and which he might avoid. *Quincy v. Barker*, 81 Ill. 300; *Aurora v. Pulfer*, 56 Ill. 270; *Chicago v. Bixby*, 84 Ill. 82; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Durkin v. Troy*, 61 Barb. 437; *Evans v. Utica*, 69 N. Y. 166; *Belton v. Baxter*, 54 N. Y. 245; *Pennsylvania R. Co.*

v. Rathgeb, 32 Ohio St. 66; Wilson v. Charleston, 8 Allen, 187; Horton v. Ipswich, 12 Cush. 488; Coates v. Canaan, 51 Vt. 181; Perkins v. Fond du Lac, 34 Wis. 435.

In McKellar v. Detroit, 57 Mich. 158, it is said that local usage goes far toward fixing the duties of municipal corporations in regard to snow and ice. In Hill v. Fond du Lac, 56 Wis. 242, 243, the duty is thus defined: "The question was not whether the mere sudden declivity in the sidewalk, in the absence of any storm or freezing, would have been dangerous, nor whether the mere storm and freezing weather, in the absence of the walk in question, and with a walk differently constructed, would have caused danger, but whether that walk so constructed, with such ice and snow as would ordinarily accumulate upon it during such severe storms and freezing weather as ordinarily occurred at that season of the year, at the place of the injury, would be unsafe for travelers upon it. If in that condition and under such circumstances it was unsafe, then it was defective. It was clearly the province of the jury to determine that question."

In Foley v. Troy, 45 Hun, 896, 898, the court say: "It is very evident that the decisions of our highest court, in this class of cases, are imposing upon cities in the northern part of the state a burden in regard to the snow and ice of the winter which is very oppressive. To require a city to clean off the snow and ice from all its many miles of sidewalks, or to be liable to any one who may slip thereon, is to place upon it a duty needing large expenditures and numerous officials. It is, perhaps, a questionable construction, which has evolved this duty from the mere obligation of keeping sidewalks in repair."

PEOPLE V. DETROIT, G. H. & M. RY. CO.

(44 N. W. R. 934; 79 Mich. 471.)

1. RAILROAD COMPANIES. POWER TO COMPEL THE MAKING OF PRIVATE CROSSINGS. A statute required that where a railroad was adjacent to, or laid upon a highway, open, unobstructed residence crossings substantially as are provided for highway crossings, should be provided and maintained by the railroad company, provided the same should be ordered by the railroad commissioner. In a suit to recover the penalty provided by the ordinance for a failure to construct a crossing to the farm residence of one F. in a case falling within the statute, and which had been ordered by the railroad commissioners, it was held: (1) That in so far as the act provided for taking the property of the railroad company for public use without compensation it was unconstitutional and void. (2) That railroad companies could not be compelled to erect and maintain residence crossings at their own expense for the use and benefit of individuals, when no statute requiring it existed at the time of the construction of the road. (3) That the facts of the case did not bring it within the power of police regulation.

Geo. Jerome and E. W. Maddaugh for appellant. *S. V. R.*

Trowbridge, Attorney-General, and *Geo. W. Smith*, Prosecuting Attorney, for the people.

GRANT, J. The people bring their suit under Act No. 165, Laws 1889, to recover a penalty for the failure of the defendant to provide an open, unobstructed residence crossing, suitably guarded, in front of the residence buildings of one Henry Fall, in the township of Bloomfield, Oakland county. Judgment was rendered against the defendant for \$140, and it appeals. The following facts were stipulated, and constitute all the evidence that was introduced upon the trial, viz.: "(1) That the defendant is a corporation, and owns and operates a railroad between the city of Detroit and the city of Grand Haven, in the state of Michigan, which runs through the township of Bloomfield, in the county of Oakland, in said state. (2) That at a point on defendant's road about one mile northerly of the village of Birmingham, in said county of Oakland, one Henry Fall owns a farm on the northerly side of said road, and has his residence there adjacent to the said railroad, and the railroad is between his residence and the usually traveled public highway, and immediately adjacent to said road, and is parallel to said road. (3) That said Henry Fall has a farm crossing, which was provided and is maintained by the defendant company, with suitable openings and gates thereto, affording him ingress and egress across defendant's road, between his residence and the highway. (4) That the defendant and said Henry Fall derive title to their said real properties independently from the same common remote grantor, the said Fall having purchased since defendant's right of way was obtained and its road constructed. (5) That the defendant company has been in possession of the right of way through said township of Bloomfield, adjacent to said Fall's farm and residence, and in operation of its railroad, for more than forty years last past. (6) That the commissioner of railroads, the Honorable John T. Rich, on the 16th day of November, A. D. 1889, made an examination, finding and order on complaint of said Fall, all substantially as alleged in the declaration, a copy of which order was duly served upon the defendant company as alleged, requiring it, in pursuance of the provisions of section 15, article 4 of Act No. 198, Session Laws 1873, as amended by Act No. 165, Session Laws 1889, within ten

days from said date, to construct an open, unobstructed residence crossing, suitably guarded, substantially as provided for highway and street crossings, and thereafter to efficiently maintain the same, so as to give Henry Fall a near, safe and convenient outlet or passage-way from his residence or real property over defendant's track to the highway running in front of the same, to-wit, at the place of residence of said Henry Fall, on the line of defendant's railway as aforesaid. (7) That defendant has neglected and refused, and still neglects and refuses, to comply with such order, substantially as alleged in plaintiff's declaration."

That portion of Act No. 165, above mentioned, imposing upon railroad companies the duty to provide and maintain these crossings, reads as follows: "And in cases where a railroad is immediately adjacent to or laid upon a highway, * * * open, unobstructed residence crossings, suitably guarded, substantially as are provided for highway and street crossings, shall be provided and maintained by the railroad corporation operating said railroad; provided, the same shall be so ordered by the railroad commissioner." The defendant contends that this provision infringes section 14, article 18, of the constitution of Michigan, which provides that "the property of no person shall be taken for public use without just compensation therefor." The argument for plaintiff is: (1) It is an exercise of the general police power over railroads. (2) It is an exercise of the police power regulating the special duties imposed upon railroad companies. It is apparent that this provision of the statute, enacted in 1889, imposes additional burdens and expense upon railroad companies. It requires them to construct and maintain residence crossings at their own expense, in addition to highway and farm crossings. Except as imposed by statute, no obligation exists on the part of a railroad company to give a right of way over its road to private individuals. While it is a *quasi* public corporation, still, in the holding and use of its land, it is entitled to the same protection as are natural persons.

The following propositions can be regarded as well settled: (1), The police power of the state over railroads includes all those regulations which are necessary for the safety and protection of persons and property in transit over them, or crossing them

upon the public highways. The state may, therefore, require the use of air-brakes, the erection of fences and cattle-guards, the stopping of trains at the crossings of other railroads, the use of bells and whistles, and many other things which will readily suggest themselves. This principle is commended by good sense, and is too well established to require the citation of authorities. (2) The power to require railroads to erect and maintain farm crossings has been the policy of this state from the beginning. Comp. Laws 1857, § 1987. The original charters of the Detroit and Pontiac Railroad Company and of the Oakland and Ottawa Railroad Company, to which the defendant succeeded, require it. Nearly, if not all the railroad companies of Michigan have acquired their rights of way under statutes containing this provision. They have condemned lands and paid the owners compensation with this in view. There has, therefore, been no hardship or injustice in these requirements, nor in compelling the companies to fulfill them. So far as I have investigated our sister states have similar statutes, and their constitutionality has been generally sustained as within the police power lodged in the state. (3) Municipal authorities, although expressly authorized by statute, cannot lay out a highway across the road-bed of a railroad, and compel the erection and maintenance of cattle-guards, etc., without compensation. The statute conferring this authority was held to be repugnant to the constitution of Michigan, and void. *People v. Railroad Co.*, 52 Mich. 277; 17 N. W. Rep'r, 841; *Grand Trunk Railway Co. v. Hough*, 61 Mich. 507; 28 N. W. Rep'r, 532; *Grand Rapids v. Railway Co.*, 58 Mich. 641; 26 N. W. Rep'r, 159. (4) The land of a railroad company can no more be taken for the use, benefit or convenience of an individual than can the property of a natural person. This principle is held applicable to the case of one railroad crossing the track and road-bed of another railroad. *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 265. Such benefit and convenience are not enough. Something must be shown to fairly bring the case within the general police power which the state may exercise over railroads. Now, an examination of the record shows that Fall applied for an "open, unobstructed residence crossing, suitably guarded, as required by section 15 of said act." It is not an application for improving, changing or constructing the farm cross-

ing, referred to in paragraph 3 of the stipulated facts. That crossing, therefore, has no bearing upon the controversy. We pass no opinion upon the duty of defendant to change this farm crossing so as to conform to the requirements of the statute in that regard. That question is not in the case. Nothing in the record shows whether the residence crossing was located in the same place as the farm crossing or not. We must, therefore, consider this as an application *de novo*, and the sole question in the case to be whether a railroad company can be compelled to make a crossing over its track from a highway to a person's residence, where none existed before. The answer to the question depends upon whether the facts agreed upon make a case for the exercise of the police power of the state. Plaintiffs concede that the property in this case is not taken for public use. Its taking, therefore, can only be justified upon the ground of public regulation. The burden of proof was upon the plaintiff. No inference can be drawn, unsupported by proofs, to sustain the action of the commissioner, or to bring it within the rule. His action is final only when, as in the verdict of a jury, there is evidence to support it. Fall purchased the premises with the situation just as it is now, and as it has been for many years, possibly forty, the length of time that the defendant's railroad has been built. The record is silent as to whether he has any other access to a highway, or as to the character and extent of his business, except that he owns a farm. But whether it is a fruit, grain or stock farm; whether it contains one acre or more; whether he requires the crossing to drive stock over; or whether he requires it for any other purpose, except for the passage of himself and family — we are not informed. The irresistible conclusion from the whole record is that Fall's application and the order of the commissioner were made with sole reference to his (Fall's) benefit and convenience. It is apparent that every open crossing into the public highway across a railroad track increases, rather than diminishes, the danger of travel, by giving animals the opportunity to get upon the track in front of passing trains. These residence crossings cannot, therefore, be justified, on the ground of protection and safety to passengers and property. The statute applies to all residence buildings. If plaintiff's contention be correct, then a land-owner, across whose land a railroad has been constructed, and who has been amply

compensated in damages, may erect twenty or more residence buildings on the land fronting the railroad and the highway, sell them, together with the lands on which they are situated, and compel the railroad company to construct and maintain as many residence crossings. Such action would seriously increase the dangers of travel, and impose heavy additional burdens upon railroads. If it is the duty of the state to provide access for every citizen to the public highway, so that he may obey the *venire* of the courts, pay his taxes, vote, send his children to school, and exercise all the prerogatives of citizenship, the state cannot perform this duty by taking the property of one citizen, and giving it to another, without compensation.

We, therefore, conclude (1) that the act above mentioned, in so far as it provides for taking the property of a railroad company for public use without compensation, is unconstitutional and void; (2) railroad companies cannot be compelled to erect and maintain residence crossings at their own expense, for the use and benefit of individuals, when no statute requiring them existed at the time of the construction of the road; (3) the facts in this case do not bring it within the power of police regulation.

Judgment must be reversed, and no new trial ordered.

Champlin, C. J., and Campbell and Long, JJ., concur.

MORSE, J. (dissenting.) Act No. 165, Public Laws 1889, of this state, provides, among other things, as follows: "And in cases where a railroad is immediately adjacent to or laid upon a highway, and intervenes between said highway or the usually-traveled portion thereof and the residence buildings of real property fronting upon said highway, unobstructed residence crossings, suitably guarded, substantially as are provided for highway and street crossings, shall be provided and maintained by the railroad corporation operating said railroad; provided, the same shall be so ordered by the railroad commissioner." I think this provision of the act is valid, as a proper exercise of the police power of the state and its control over railroads, as applied to all such roads built after its passage; and, perhaps, it might not be unconstitutional as applied to cases of railroads built and operated before this act took effect, when the residence building was upon

the premises before the railroad company ran its road between it and the highway. But in this case it appears that the railroad company and the residence owner acquired title from the same grantor, and that the railroad company got its title first. Whether the company has a title in fee or only a right of way does not appear, and, if a right of way, whether its title was acquired by condemnation or purchase. Under these circumstances, I concur in the opinion that Mr. Fall, the residence owner, cannot, under this act, compel the defendant to open and maintain at its own expense the crossing provided for in this act. The law cannot be given such a retroactive effect as to destroy property rights in real estate, vested for more than forty years in the defendant, without compensation, and throw additional burdens for all time upon such real estate—burdens not contemplated nor necessary for any reason when such property was acquired. This being a penal action, it must be considered under the finding that the defendant obtained its title before Mr. Fall purchased his farm, and that both hold their lands by deeds from a common grantor; that the residence was not built at the time the railroad was, or, if built, that the owner of it, this common grantor, received at that time adequate compensation for the inconveniences resulting from the running of the railroad between the house and the highway. For this reason I agree in the result of this case as announced by my brethren. But I am satisfied that a railroad company does not stand, as to the exercise of state control, upon the same footing as private persons, and that its property can be subjected to burdens not imposed on the mere owners of private property, used purely and exclusively for private interests and purposes, for the reason that all property devoted to public uses takes on *quasi* public qualities, and is, therefore, subject to limitations on such use by the state, and to legislative control, when such control seems necessary to the legislature, and is reasonable; and of the necessity of such control the legislature is the sole judge, and courts can only inquire into the reasonableness of the methods of such control. A railroad may be required to fence its tracks and construct cattle-guards and to construct farm crossings. The railroads of this state have always been subject to regulations of this kind imposed upon them by the state, and no one has doubted the right of the legislature to regulate and control them

in this respect. And I am not prepared to say that this act could not reach back, and be operative and valid, in a case where the dwelling-house was upon the land at the time the road was built, and the owner of the land acquired his title first, and the company obtained its right of way by condemnation, and the residence owner has no access to any other highway. In other words, I am satisfied of the authority of the legislature, under the general police power of the state, to make the regulation as to residence crossings found in this act, and that it is a reasonable one, as applied to cases arising after the act became a law. Whether or not it can be applied to cases where the conditions of the premises, railroad and highway are the same as they were before the passage of the act, in my opinion depends upon the reasonableness of the regulation as applied to each particular case. While conceding the potency of the police power of the state, I do not think it omnipotent; and as said before, in *Whitney v. Board*, 39 N. W. Rep'r, at page 42, the legislature cannot arbitrarily and without reason, and in defiance of right, pass any statute it may see fit under this power. This statute, while reasonable and proper and valid as to all conditions and circumstances of residence crossings coming within its provisions hereafter, cannot be arbitrarily, unreasonably, and in defiance of right applied to the case in hand.

Highways cannot be laid out over railroads without compensation.—In New York it is held that, under a general reservation of power to repeal, alter or amend incorporation acts, the legislature may authorize highways to be laid out across a railroad without compensation, and that the railroad may be compelled to construct the crossing. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston & Albany R. Co. v. Greenbush*, 52 N. Y. 510. In Maine it has been held that the legislature might exercise the same power, though the right to repeal, alter or amend was not reserved. *Boston & Maine R. Co. v. County Comrs.*, 79 Me. 386. Other states hold that highways cannot be laid out across railroads without compensation. *Old Colony & Fall River R. Co. v. County of Plymouth*, 14 Gray, 155; *Boston & Maine R. Co. v. County of Middlesex*, 1 Allen, 324; *Grand Rapids v. Grand Rapids & Ind. R. Co.*, 58 Mich. 641; *Chicago & Grand Trunk R. Co. v. Hough*, 61 Mich. 507. The compensation must include a sum sufficient to enable the railroad to construct and maintain the crossing with suitable signs, cattle-guards, etc. *Ibid.* But nothing can be allowed on account of the possibility of accidents at the crossing, nor for the expense of ringing a bell, or in view of the contingency of its having to build a bridge to carry the highway over. *Old Colony, etc., R. Co. v. County of Plymouth*, 14 Gray,

155; *Boston & Maine R. Co. v. County Comrs.*, 79 Me. 386; *Portland, etc., R. Co. v. Deering*, 78 Me. 61.

SMITH ET AL. V. PHOENIX INS. CO.

(23 Pac. R. 383; — Cal. —).

1. **INSURANCE. CONDITION AGAINST CHANGE OF TITLE OR POSSESSION.** Plaintiff insured certain hotel property in the defendant company. The policy provided that if there should be any change in the title or possession of the property there should be no liability under the policy. Subsequently the plaintiff leased the property to S. for five years with an agreement that S. might purchase the property at any time within the five years at a specified price, and binding him to purchase it at that price on or before the expiration of the five years. S. took possession of the property. Held, that there was such a change in the title of the property as avoided the policy.

2. **EFFECT OF NOTICE TO THE COMPANY.** The fact that the company knew that S. was in possession of the property under the lease, though it did not know of the agreement to purchase, would not prevent it from insisting upon the condition or constitute a waiver of it.

Van Ness & Roche for appellant. *Barclay, Wilson & Carpenter* for respondents.

WORKS, J. This was an action on a policy of fire insurance. Trial by the court, and finding and judgment for the plaintiffs. The defendant appeals from the judgment, and the case comes up on the judgment-roll. The policy sued on contained the following clause: "If the interest of the assured in the property be other than an absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if the building insured or containing the property insured by this policy stands on leased ground, or if there be a mortgage or other incumbrance thereon, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void. When the property shall be sold or incumbered or otherwise disposed of, written notices shall be given to the company of such sale or incumbrance or disposal, and its assent thereto indorsed thereon; otherwise this insurance on said property shall immediately terminate. * * * If the property be

sold or transferred (in whole or in part), or upon the commencement of foreclosure proceedings against or a sale under a deed of trust, or the existence of a judgment lien upon, or the issue or levy of an execution against, any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer, assignment or conveyance, or if the title or possession shall be changed from any cause whatsoever, * * * then there shall be no liability whatever under this policy for any loss or damage resulting from fire or fires, whether such loss or damage be immediate or remote." Subsequent to the issuance of the policy, the assured leased the property to one Jerome D. Stewart for the term of five years, and the lease also contained an agreement between the respondent and said Stewart for the sale of said property, as follows: "It is further agreed that said party of the second part may, at any time during the said term of five years, purchase said hotel, lots and premises for the sum of \$25,000 cash, and likewise purchase said carpets, gas fixtures and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots and premises on or before five years from this date for the sum of \$25,000, together with the said carpets, gas fixtures and range at their cost price." It was further agreed that the said Stewart should pay one-half of the insurance on the property. Stewart took possession under this lease.

It will be observed that the policy is rendered void if at the time of the issuance thereof any other person or persons have any interest whatever in the property. So if, "after the policy takes effect, the property be sold or transferred, * * * or any change takes place in the title or possession * * * or the title or possession shall be changed from any cause whatsoever." The sole question in the case is whether the contract above mentioned, and the change of possession thereunder, was within these prohibitions, and worked a forfeiture of the policy. These forfeiture clauses in the policy should be strictly construed, and, where the prohibition is against a sale or alienation or conveyance of the property, an agreement to sell is not within its

terms. *Hitchcock v. Insurance Co.*, 26 N. Y. 68; *Jackson v. Insurance Co.*, 23 Pick. 418; *Gingrich v. Foltz*, 19 Penn. St. 38; *Masters v. Insurance Co.*, 11 Barb. 624; *Orrell v. Insurance Co.*, 13 Gray, 431; *Trumbull v. Insurance Co.*, 12 Ohio, 305; *Hill v. Protection Co.*, 59 Penn. St. 474; *Insurance Co. v. Kelly*, 32 Md. 421. And it has been held that, so long as the assured retains an insurable interest in the property, he is entitled to recover to the extent of such interest. *Stetson v. Insurance Co.*, 4 Mass. 330; 3 Kent Comm. 261; *Trumbull v. Insurance Co.*, *supra*.

But the question before us is not whether there had been a sale, alienation or conveyance of the property, or whether the assured had an insurable interest at the time of the loss, but whether "any change" had taken place in the title or possession. About this it seems to us that there can be no doubt. The agreement between the parties gave the vendee the option to buy at any time during the five years for which his lease ran, and absolutely bound him to buy and pay the purchase-money at the end of that time. This gave him an equitable title in the land. *De Rutte v. Muldrow*, 16 Cal. 505-512; *Hall v. Center*, 40 Cal. 63; *Dowd v. Clarke*, 54 Cal. 48; *Pelton v. Insurance Co.*, 77 N. Y. 605; *Davidson v. Insurance Co. (Iowa)*, 32 N. W. Rep'r, 514; *Germond v. Insurance Co.*, 2 Hun, 540; *Ramsey v. Insurance Co.*, 2 Fed. Rep'r, 429; 2 Am. Law Reg. (N. S.) 438; *Moore v. Burrows*, 34 Barb. 173.

If an attempt had been made to recover the possession of the property during the term for any violation of the terms of the lease, he could have defeated such recovery by exercising his option to buy. He was entitled, under his agreement, to continue in the possession of the property either before or at the end of his tenancy by paying the purchase-money, and upon such payment he would have been entitled to a conveyance. Having bound himself absolutely and unconditionally to purchase and pay for the property at the end of his tenancy, he would have been bound to purchase and make such payment, notwithstanding the destruction of the building by fire. *Davidson v. Insurance Co.*, *supra*; *McKechie v. Sterling*, 48 Barb. 330. His only right would have been to look to the respondent for the insurance if it had been paid. It has been held that in such cases the insurance recovered

belongs, in equity, to the vendee, and that the vendor holds it in trust for him. *Reed v. Lukens*, 44 Penn. St. 200. Therefore, there was not only a change in the title, but a very important and material one, which took away from the respondent, in a great measure, the incentive every one has to preserve his property and prevent its loss by fire. In some of the cases it is held that such a contract constitutes a sale of the property, where, as in this case, nothing is to be done on the part of the vendor but to execute the deed. *Davidson v. Insurance Co.*, *supra*. In this case the court said: "The precise language of that portion of the policy which is alleged to have been violated is in these words: 'In case any such property shall be sold, conveyed or incumbered * * * without the written consent of this company is obtained * * * this policy shall immediately thereafter be null and void.' It is manifest from the above that the policy contemplated that there might be a sale without a conveyance. The provision is the same as if the word 'or' had been expressed between the words 'sold' and 'conveyed,' and as if the policy read: 'In case any such property shall be sold or conveyed,' etc. In either case the policy would be void. We come, then, to the question as to whether, where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate, within the meaning of the policy. In answer to this question we have to say that we think it does. Lint was the real owner of the house that was burned. The loss was his loss. The plaintiff lost nothing, unless he needed the house for security. If Lint is responsible, or the property without the house is sufficient security for the balance of the purchase-money, the plaintiff's claim can be collected, and he will have all that he would have had if the house had not been burned. If he is allowed to collect the insurance and the purchase-money both, he will profit by the destruction of the property. That the insured shall not by his own voluntary act come to have an interest in the destruction of the insured property is forbidden, not only by public policy, but by all the max-

ims of insurance, and is precisely what this defendant attempted to guard against."

It is uniformly held that a vendee in possession under an agreement to purchase real estate is in equity the owner of the property, subject to the payment of the purchase-money; and the vendor a trustee, with the right to hold the legal title until payment thereof, and then to convey to the vendee. *Baldwin v. Pool*, 74 Ill. 97; *Roberts v. Wilkinson*, 34 Mich. 138; *Derr v. Dellinger*, 75 N. C. 300; *King v. Ruckman*, 21 N. J. Eq. 599; *Holbrook v. Betton*, 5 Fla. 99. And such an interest will be regarded as an absolute interest, where the assured has represented his interest to be such. *Hough v. Insurance Co.*, 29 Conn. 10; *Insurance Co. v. Wilgus*, 88 Penn. St. 107; *Insurance Co. v. Dyche*, 56 Tex. 565; *Insurance Co. v. Crockett*, 7 Lea, 725. The respondent could not have conveyed the property to another, even if the agreement could be construed as one not, in terms, binding him to convey. If the contract left the purchase at the option of Stewart, the respondent could not convey away the property until the time for exercising such option had expired. *Kerr v. Day*, 14 Penn. St. 112. In this case the purchase was not left to the option of the vendee. He had the option to buy at any time before the expiration of the term, but was bound absolutely to purchase at the end of his term. We think it is clear, therefore, that there was such a change of title here as to avoid the policy. The fact that the agreement to convey was coupled with a lease of the property, under which alone the vendee might have taken possession, does not seem to us to be at all material. The equitable title passed, and he was as much in possession under the agreement to convey as under the lease. The court found that the appellant had notice before the loss, that Stewart was in possession of the property under the lease, but that it had no knowledge of the fact that the agreement to convey was contained in such lease. We do not think that such notice to the company could affect its right to insist upon the enforcement of the express provisions of its contract, or constituted a waiver of such right.

Judgment reversed, with instructions to the court below to render judgment on the findings in favor of the defendant.

We concur: Beatty, C. J.; Fox, Sharpstein, JJ.

I dissent: Paterson, J.

THORNTON, J. I concur in the judgment, on the ground that there was a change of possession by the lessee's (Stewart's) taking possession under the lease, and when this change took place all liability under the policy sued on was, by its terms, at an end.

1. Insurance — condition against change of title.—Change of title by death held not within the condition. *Richardson's Adm. v. German Ins. Co.*, 1 Am. R. R. & Corp. Rep. 703; *Pfister v. Gerwig*, ante.

2. Condition against incumbrances.—A provision that if the property shall become incumbered by mortgage is violated by a mortgage given to secure one as surety for the insured, though no right of action has accrued thereunder. It was an increase of the risk by diminishing the assured's interest in the property. *Lee v. Agricultural Ins. Co. (Iowa)*, 44 N. W. Rep'r, 683.

DONEGAN V. ERHARDT, RECEIVER.

(23 N. E. R. 1051; 119 N. Y. 468.)

1. RAILROAD COMPANIES. INJURY TO BRAKEMEN FROM COLLIDING WITH A HORSE STRAYED UPON THE TRACK THROUGH A DEFECTIVE FENCE. Where it is the duty of a railroad company by statute to maintain fences along its right of way, and it permits them to become out of repair, and, in consequence of such want of repair, a horse escapes upon the track and causes the wreck of a train, the company will be liable to a brakeman on the train, who, without his fault, is injured in the wreck.

2. DUTY TO FENCE TRACK INDEPENDENT OF STATUTE. In the absence of any statute requiring the company to fence its road, circumstances may exist in which it would be the duty of the company at common law to build and maintain such fences for the safety of those employed or riding on its trains.

3. THE STATUTE CONSTRUED. The statute in question provided that in case of failure to build or keep in repair a fence as required, the company should be liable for the damages done by its agents or engines to any cattle, horses, sheep or hogs thereon. Held, that the statute was not intended to limit liability to the instances specified, but that such instances were specified because, in the absence of the statute, it would be the duty of the owner to restrain his stock, and the company would not be liable for its destruction while trespassing on its right of way.

Hector M. Hitchings for appellant. *Sherman Evarts* for respondent.

EABL, J. While the plaintiff, in 1887, was in the employ of the defendant, as a brakeman upon a train of cars in the night time, the train came in collision with a horse upon the railroad track, and was thereby wrecked; and he was seriously injured.

He brought this action to recover damages for his injuries, claiming that the horse got upon the railroad track because the defendant had carelessly and negligently permitted the fence along the railroad to become ruinous, broken down and out of repair, and that it had, therefore, violated the duty imposed upon it by section 44 of the General Railroad Act of 1850, which requires railroad companies to build and maintain fences on the sides of their roads of the height and strength of division fences, and that so long as such fences and cattle-guards shall not be made, and when not in good repair, such railroad corporation and its agents shall be liable for damages which shall be done by the agents or engines of any such corporation to any cattle, horses, sheep or hogs thereof. The claim of the defendant was that at common law, independently of the statute, the railroad company would not have been liable for the accident which happened to the plaintiff, and that the statute specified the extent of the liability imposed upon a railroad corporation for its omission to build or maintain fences, and that thus it was liable only for damages done to animals coming upon the railroad track through a defective fence. The trial judge, however, submitted the case to the jury, and instructed them that if this horse came upon the railroad through a fence which the defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, the plaintiff could recover; and the jury rendered a verdict in his favor. From the judgment entered upon the verdict the defendant appealed to the general term, and there the judgment was reversed upon the ground that the only responsibility of a railroad company for defective fences is that mentioned in the statute, and that at common law, independently of the statute, a railroad company would not have been liable to the plaintiff for the injuries sustained by him.

We think the learned general term fell into error. A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, and the road-bed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper

care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them, and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track, to guard against such danger. But, whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty; and for a violation thereof, causing injury, the railroad company incurs responsibility. The sole consequence of an omission of the statutory duty is not specified, and was not intended to be specified, in the statute. Responsibility for injuries to animals was specially imposed, because in most cases there would, independently of the statute, have been no such responsibility, as at common law the owner of animals was bound to restrain them; and, if they trespassed upon a railroad, there was no liability for their destruction, unless it was willfully or intentionally caused. We are, therefore, of the opinion that the railroad company was responsible to the plaintiff for the injuries which he received, without any fault on his part; and for this conclusion there is much authority in judicial utterances to be found in the books. *Corwin v. Railroad Co.*, 13 N. Y. 42; *Jetter v. Railroad Co.*, *41 N. Y. 162; *Staats v. Railroad Co.*, *42 N. Y. 196; *Brown v. Railroad Co.*, 34 N. Y. 404; *Shepard v. Railroad Co.*, 35 N. Y. 641; *Purdy v. Railroad Co.*, 61 N. Y. 353; *Jones v. Seligman*, 81 N. Y. 190; *Graham v. Canal Co.*, 46 Hun, 386. The case of *Langlois v. Railroad Co.*, 19 Barb. 364, so far as it holds a different doctrine, does not meet with our approval.

The order of the general term should, therefore, be reversed, and the judgment entered upon the verdict affirmed, with costs. All concur.

1. Whether railroad companies are bound at common law to fence their right of way for the safety of travelers and employees.—In *Dean v. Sullivan R. Co.*, 22 N. H. 816, 821, the court says: "We are by no means sure that upon the same principle upon which towns and turnpike and bridge companies are subjected to the duty of guarding dangerous causeways, side-hills, cuts and bridges by railings, for the safety of travelers, the duty would not be implied at common law, that is, by an extension of legal principles, to a new case falling *in pari ratione*, upon railroad corporations to maintain everywhere, where they were needed, such fences as would prevent any danger to travelers from the animals, either of neighboring land-owners, or others, escaping upon the track. This point it is at present unnecessary to decide, because we are satisfied the same duty is necessarily implied from the Revised Statutes."

In *Lackawanna, etc. R. Co. v. Chenewith*, 53 Penn. St. 883, the point was involved, and the court held that: "Although a railroad may not be bound to fence its track against trespassing cattle, it is well settled that as between it and its passengers, it must take the risk of injury to them from such cause; and it is no answer to a claim for injury for such a cause, that the defendant was not bound to fence, or that the cattle were on their track trespassing without their agency or knowledge. Their being there at the time of the accident always raises a question of negligence or care; and whether negligence is imputable to the company, or whether they have exercised due care to guard against obstruction from such cause, is always and only determinable by the jury."

In *Buxton v. North-Eastern Ry. Co., L. R.*, 3 Q. B. 849, which was an action for an injury to a passenger by a collision with a bullock on the track, the court say, as to the duty of railroad companies at common law, that "they are bound to take every reasonable care to prevent danger to their passengers from cattle coming on the line in those places where it is probable that such an event may occur," and that such "reasonable care" may require them to fence in certain localities.

2. Whether the statutory duty to fence is for the benefit of children.—In Michigan and Wisconsin it has been held that the statutes of those states in regard to fencing railroad tracks are for the benefit of children, and that a railroad company is liable for an injury to a child who strayed upon the track for want of such a fence as the statute required. *Keyser v. Chicago, etc., R. Co.*, 66 Mich. 390; S. C., 56 Mich. 559; *Marcott v. Marquette, etc., R. Co.*, 47 Mich. 1; S. C., 49 Mich. 99; *Schmidt v. Milwaukee, etc., R. Co.*, 23 Wis. 186. In *Keyser v. Chicago, etc., R. Co.*, 66 Mich. 390, 397, the court says:

"The statute requires the defendant to fence its road with a fence 'sufficient to prevent cattle or other animals from getting on such railroad.' This clause quoted is only descriptive of the sufficiency of the structure to furnish the required protection. The duty of the company in this respect is a positive one. The public, as well as the company, are entitled to the benefit and protection it affords against the perils and dangers incident to the use made of the road, and it would be strange reasoning indeed, that would give to the citizen living along the line of these roads this barrier against danger of injury to 'his cattle and other animals,' and deny it to his infant children who are not yet old enough to enable them to comprehend such perils and dangers.

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The legislature never intended any such limitation upon the protection to be furnished by the fencing required by the statute, and no decision of any court giving the statute such a construction can receive my approval."

A different view is taken in *Fitzgerald v. St. Paul, etc., Ry. Co.*, 29 Minn. 386.

A statute of Iowa provided that "any corporation operating a railway, that fails to fence the same against live stock running at large, at all points, where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence, or for the value of the property or damage caused," etc. Held, not to impose an absolute obligation to fence, and that a railroad company was not liable for an injury to a child by reason of the absence of a fence, there being no other negligence. *Walkenhauer v. Chicago, etc., R. Co.*, 17 Fed. Rep'r, 186, McCrary, J.

3. Whether such statutes are for the benefit of travelers and employes of the company. — In *Langlois v. Buffalo, etc., R. Co.*, 19 Barb. 384, which was a similar action to that of the principal case, the court held that the same statute, or one precisely like it, did not impose any duty on the company for the benefit of its employes. The principal case is sustained by a dictum in *Fitzgerald v. St. Paul, etc., Ry. Co.*, 29 Minn. 386, which says that the object of the statute was to protect animals and travelers and employes on the road.

In *Hynes v. San Francisco, etc., R. Co.*, 65 Cal. 816, it appeared that plaintiff was riding a horse which became frightened and ran on the track and was injured. The company was held liable because it had neglected to construct a fence at the point in question, in violation of the statute.

CORN EXCHANGE BANK V. FARMERS' NATIONAL BANK OF LANCASTER, PA.

(23 N. E. R. 923; 118 N. Y. 443.)

1. BANKS AND BANKING. INSOLVENCY. CONFLICTING CLAIMS TO PROCEEDS OF CHECKS. C., holding a check upon the defendant bank payable to his order, indorsed the same in blank and delivered it to the H. bank for collection. The H. bank indorsed it "for collection and credit," and sent it to the plaintiff bank which indorsed it "for collection and remittance" and sent it to the defendant, which charged the check to the drawer and canceled it and mailed its draft for the amount of the check, less its charges to the plaintiff. The H. bank having failed in the meantime, C. requested the defendant to stop payment of its draft, which it did. The plaintiff bank sued to recover the amount of the draft. Held, that the defendant, having received the check for collection and having made the collection and charged for the service, became the agent of the plaintiff, and that, having delivered to the plaintiff its draft for the proceeds, could not resist payment of the same on the basis of the legal or equitable rights of a third person who had no privity with either,

John M. Bowers for appellant. *Jefferson Clark* for respondent.

FOLLETT, C. J. In July, 1884, Mary C. Melson resided at Lancaster, Pa., where the Farmers' National Bank of Lancaster was located, with which she kept an account. July 9, 1884, she drew a check on this bank for \$1,871.84, payable to John J. Cameron or order, and mailed it to him at Indianapolis, Ind., who, July 15, 1884, indorsed it in blank, and delivered it to a firm of private bankers doing business at Indianapolis under the name of "Harrison's Bank." The check, though indorsed in blank, was in fact delivered and received for the purpose of collection only. The Corn Exchange Bank was the New York city correspondent of Harrison's Bank, and they exchanged collections, and kept mutual accounts, Harrison's Bank being accustomed to draw sight-bills or checks against its balance with the Corn Exchange Bank. The view we take of this case makes it unnecessary to further consider the manner in which these accounts had previously been kept. July 15, 1884, Harrison's Bank indorsed the check to the Corn Exchange Bank for collection and credit, and forwarded it by mail. It was received July 17, and credited by the Corn Exchange Bank to Harrison's Bank, reserving, however, the right to charge it to Harrison's Bank if it should be dishonored. It was not found by the court, nor was it asserted, that the Corn Exchange Bank knew, or had the slightest reason to suspect, that Harrison's Bank did not own the check, and was acting only as a collecting agent for Cameron, or some undisclosed owner; and so the Corn Exchange Bank became the holder of the check in good faith, and could, had it been dishonored, have maintained an action thereon for its collection. July 17, the Corn Exchange Bank indorsed the check "for collection and remittance" to the Farmers' National Bank of Lancaster, the drawee, with directions to remit by draft payable in the city of New York. July 18 the check was received by the Farmers' National Bank of Lancaster, was charged to the account of the drawer, Mary C. Melson, and canceled. For this service the Farmers' National Bank of Lancaster charged the Corn Exchange Bank \$1.84, and on the same day drew its check or sight-draft, payable to the Corn Exchange Bank or order, on the First National Bank of New York, for \$1,870, and mailed it to the Corn Exchange Bank.

The check was no longer a valid contract. The liability of the

drawer and indorsers thereon was ended, and could never be restored. The Lancaster bank had legally, and in good faith, discharged its duty to the drawer, the indorsers, and the holder of the check; and the Corn Exchange Bank had accepted of the draft of the Lancaster bank in discharge of the liability of the drawer and indorsers. The Lancaster bank accepted of the agency tendered by the Corn Exchange Bank, performed the services, and received payment therefor. The relation of principal and agent was established; and, in discharge of its liability thus assumed, the Lancaster bank mailed the draft. July 17, 1884, Harrison's Bank failed; and on the 18th, but after the check had been paid and canceled, and the draft given in payment mailed, the drawer of the check, Mary C. Melson, and the payee, John J. Cameron, requested the Lancaster bank to stop payment of its draft, which it did, and the draft was dishonored. The Corn Exchange Bank brings this action to recover the amount of the draft, which the Lancaster bank defends on the ground that the plaintiff did not hold the check for value, and is not entitled to its proceeds as against John J. Cameron, the payee. The defense is not placed on the ground that it is necessary to protect the defendant from any present or future liability; for it is conceded that it has exactly performed all of its duties in respect to the check. It does not deny that it became the agent, for a consideration, of the Corn Exchange Bank, and promised by its draft to pay the plaintiff \$1,870.

By the law of this state, Harrison's Bank was the agent for Cameron, but neither the plaintiff nor defendant was his agent; and, had either neglected to take the necessary steps to collect the check, to Cameron's injury, he would have had no right of action against either, but would have had a cause of action against Harrison's Bank. *Allen v. Bank*, 22 Wend. 215; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Ayrault v. Bank*, 47 N. Y. 570; *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, 112 U. S. 276; 5 Sup. Ct. Rep'r, 141; *Morse Banks* (3d ed.), § 272. In *Montgomery Co. Bank v. Albany City Bank* and the *Bank of the State of New York*, *supra*, the plaintiff indorsed and sent a draft to the Albany City Bank for collection, which in turn indorsed and sent it to the Bank of the State of

New York for collection ; but the latter bank negligently omitted to present the draft for payment, and the drawer and indorsers were discharged. The plaintiff sued both banks, and recovered against both at circuit, and the judgment was affirmed by the general term ; but it was reversed in the court of appeals as to the Bank of the State of New York, and affirmed as to the Albany City Bank. It was said : "The New York State Bank was the agent directly guilty of the neglect. That bank was employed to do the service by the plaintiff's agent, the Albany City Bank, as its agent, to which it was alone responsible for its acts and neglect, and for which the latter, according to the settled rule, was alone responsible to the plaintiff ; there being no agreement to the contrary, expressed or implied." It is unnecessary to specially consider the cases which were decided in this state prior to *Allen v. Bank*, supra, or those of states in which it is held that the bank receiving payment of the paper is the agent of the owner, notwithstanding it may have passed through several banks before reaching the bank making the collection.

The ground upon which the defendant seeks to justify the refusal to perform its contract with its principal seems to be that, if the plaintiff receives the money, it ought to pay it to John J. Cameron, but may not, and, therefore, this defense. Assuming, but not deciding, that Cameron could maintain an action against the Corn Exchange Bank to recover the amount of the check, such fact would in no wise support this defendant's contention. No contract relation exists between it and Cameron, nor is there any privity between them. When the owner of commercial paper delivers it for collection to bank A, which forwards it for collection to bank B, which in turn forwards it for collection to bank C, to which it is paid, it has been held that if bank C, instead of paying the money to bank B, retains and applies it on a debt due from bank B, the owner (bank A being insolvent) may recover of bank C ; but we are unable to see that these cases justify this defendant in resisting the payment of its draft, to which it has no defense, for the benefit of a third person, who may have a right to recover the money represented by it. The check which the defendant received from the plaintiff having been paid, charged to the account of the drawee, and surrendered, the account closed, and a draft therefor delivered to the Corn Ex-

change Bank, the defendant cannot now assert as against its principal the legal rights or equities of a third person. *McKay v. Draper*, 27 N. Y. 256; *Aubery v. Fiske*, 36 N. Y. 47; *Whart. Ag.*, § 242, and cases there cited. The judgment should be reversed, and a new trial granted, with costs to abide the event.

Potter, Vann, and Parker, JJ., concur. Bradley, J., reads dissenting opinion, and Brown, J., concurs. Haight, J., not sitting.

In this case Bradley and Brown, JJ., dissented and the former filed a dissenting opinion in which he made the following points:

The check having been placed in Harrison's hands for collection, and being by them indorsed to the plaintiff for collection, the latter, by crediting them with it in general account, acquired no title to it as against Cameron, the payee. *Dickerson v. Wason*, 47 N. Y. 439; *Warner v. Lee*, 6 N. Y. 144; *Commercial Bank v. Marine Bank*, 1 Abb. Ct. App. Dec. 405; *Farmers' M. N. Bank v. King*, 57 Penn. St. 702.

The defendant could not voluntarily bring forward the title of a third party to defeat that of the plaintiff. *City Bank v. Perkins*, 29 N. Y. 554; *McKay v. Draper*, 27 N. Y. 256; *Aubery v. Fiske*, 36 N. Y. 47; *Hays v. Hathorn*, 74 N. Y. 486.

But in this case Cameron never parted with the title to the check. The Harrisons were employed by him to collect it, and the plaintiff was employed by them to aid in the accomplishment of the purpose for which it was left with them by the payee. The latter had a right to step in and intercept the check in the hands of any party other than a holder in good faith for value and reclaim it as his property, and in like manner to interrupt the transmission of the proceeds of it to the Harrisons and recover them. The direction of Cameron to stop the payment to the plaintiff, operated as a revocation of the agency he had set in motion and to stay, at the then stage of their progress, the means which had been adopted for its execution. It was immaterial that the defendant had forwarded its draft. That was simply a means of transmitting the money to the plaintiff, and the question would have been the same if the defendant's messenger had been on his way with the money in his possession to be paid to the plaintiff and had been recalled.

It follows that the defendant was justified in asserting that the plaintiff had no right to the fund represented by the draft, as effectually as Cameron could have done if he had been interpleaded as a party defendant, *Comstock v. Hoag*, 5 Wend. 600; *Herrick v. Carman*, 10 Johns. 224; *Barker v. Prentiss*, 6 Mass. 430.

The state of account between the plaintiff and the Harrisons was immaterial, as the plaintiff made no advances on the draft, but credited it on general account. *McBride v. Farmers' Bank*, 26 N. Y. 450; *Lindauer v. Fourth National Bank*, 55 Barb. 75; *Dod v. Fourth National Bank*, 59 Barb. 265.

The plaintiff could not have maintained an action on the check in its own name. The indorsement "for collection" denied to the plaintiff the apparent

title, and it had none in fact, to support any action in its name on the check. Dan. Neg. Inst., §§ 698, 699; *White v. National Bank*, 102 U. S. 658; *Sigourney v. Lloyd*, 8 Barn. & C. 622; *Hook v. Pratt*, 78 N. Y. 371; *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 835.

CITY OF FORT WAYNE V. BREESE.

(23 N. E. R. 1088; 123 Ind. 581.)

1. MUNICIPAL CORPORATIONS. DEFECTIVE SIDEWALK. CONTRIBUTORY NEGLIGENCE. Plaintiff was injured by reason of a defective sidewalk. The defect consisted in a loose plank. The plaintiff's companion stepped upon it, the end flew up, and the plaintiff tripped and fell. The sidewalk generally was out of repair. Held, that the plaintiff was not guilty of contributory negligence in using the walk if its condition was such that a person might reasonably expect, by the exercise of proper care, to avoid injury while walking over it.

Henry Colerick for appellant. *Jas. B. Harper* for appellee.

OLDS, J. This action was brought by the appellee against the appellant to recover for damages alleged to have been sustained by her in falling upon a public sidewalk in the city of Fort Wayne. Issue was joined, and there was a trial, resulting in a verdict and judgment in favor of appellee for \$1,040. Appellants filed a motion for new trial, which was overruled, and exceptions filed. Two errors are assigned: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the court erred in overruling the motion for new trial. The first alleged error is not discussed, and is, therefore, waived. A reversal of the judgment is asked for two reasons. It is claimed — First, that the undisputed evidence shows the appellee to have been guilty of contributory negligence; and, second, that the damages are excessive. Interrogatories were submitted to and answered by the jury. The interrogatories and answers are as follows: “(1) Were the planks, boards and shingles upon the sidewalk in such condition as to be dangerous for two persons to travel side by side upon, and at the same time? Answer. Yes. (2) Could not the plaintiff see the condition of the walk? A. Yes. (3) Was not the walk dangerous? A. Yes. (4) Did not plaintiff voluntarily assume the danger of going upon and over said walk?

A. No. (5) Did not the plaintiff know before she was injured that the planks upon the walk were loose and unfastened? A. No. (6) Did plaintiff know that, by walking upon the ends of the boards upon said walk, that the same would rise, and throw the other end up? A. No."

It is conceded by counsel for appellant that the sidewalk was out of repair and dangerous, and that the city was guilty of negligence; but the sole ground of complaint is that the evidence shows the appellant guilty of contributory negligence. It is well settled by numerous decisions of this court that one is not bound to abandon the use of a street or sidewalk, even if he knows it to be out of repair, unless the condition of the street or sidewalk be so defective as to render it impassable, or as to be apparent to a person of common understanding that to enter upon it at all would be dangerous. A succinct statement of the law is stated by Mitchell, J., in delivering the opinion of the court in the case of *Town of Gosport v. Evans*, 112 Ind. 133; 13 N. E. Rep'r, 256, as follows: "The doctrine to be extracted from these cases is that, although a sidewalk or highway may be in an apparently defective or dangerous condition, yet a person with knowledge of the defect or danger is not on that account obliged to abandon travel upon the highway if, by the exercise of care proportioned to the known danger, he may reasonably expect to shun or avoid the defect. If the defect be one which does not render the way wholly impassable, and which can only result injuriously to the traveler if not shunned, if there be an apparently safe way of passage without going into the obvious defect, the traveler is not to be held to a rigorous account if he is deceived or misled notwithstanding his effort to avoid the danger." This rule of law is not seriously controverted by counsel for the appellant or appellee, but the controversy is rather in applying the rule to the facts in the case, counsel differing widely as to what the evidence establishes. We think this statement of the law conclusive of the case, and that the verdict of the jury and judgment must be sustained. The answers to interrogatories fully support the verdict, and, if there is evidence to support the general verdict, this court cannot disturb it, even if the weight of the evidence seemed to be against the theory adopted by the jury; but we think the evidence fairly supports the verdict. It may fairly be inferred

from the evidence, indeed, it may be said that the evidence establishes the facts: That the appellee, a widow, and keeping house by herself, desired for some purpose to see her married son, who lived in another part of the city, and who worked at the Olds Wagon Factory, and, knowing he would be at leisure at noon-time, she determined to go to the wagon factory to see him during his noon hour, and started to go there, taking the street leading to the wagon works. The sidewalk over which appellant passed was out of repair; some boards missing, and others loose. She pursued her way carefully, and avoiding danger. She did not know in what part of the factory her son worked. As she came near the shop, she saw a gentleman whom she supposed worked at the factory walking rapidly along said street; and she called to him, and made inquiry in regard to her son. While doing so, he slackened his walk, and was walking slowly beside the appellee, she arranging to have him to communicate to her son in the shop the fact that she desired to see him. But few words had been exchanged between them when the gentleman stepped upon a board in the sidewalk, towards one end of it, and the opposite end flew up, or raised up suddenly, and tripped and threw the appellee down, and injured her. That the board did not look as if it was loose, and the sidewalk looked better, and more secure, at that point than the portion she had passed over, and that she was proceeding with due care and caution. The street was an improved and traveled street. The appellee was not accustomed to traveling upon it, and had not been upon it for over a year; and she was exercising special care on account of the defective walk. The sidewalk was used by the public, but there was an occasional board broken or loose or absent. It would not be discovered that the board on which the gentleman stepped, and which tripped the appellee, or the others, were loose, without stepping upon or examining them. That, while the sidewalk was out of repair, yet it was in such condition as to be in constant use by the public. That it was not so defective but what it was in general use, and that one might expect to pass over it, using due caution, and avoid injury. Indeed, the appellee would have, no doubt, passed over it without injury, had it not been for the unforeseen occurrence of falling in company with the gentleman, and his stepping on the loose board. There was evidence; as we have stated, from

which the jury might have very properly found the foregoing facts. It is clearly apparent that the appellee was not guilty of any contributory negligence, unless it was in going upon the sidewalk at all. If she was guilty of any negligence, it was in not abandoning the street; and it has been repeatedly held by this court that persons are not required to abandon the use of a street under such circumstances. See *Town of Gosport v. Evans*, supra, and authorities collected in the opinion. The evidence sustains the verdict. We cannot disturb the verdict on the ground that it is excessive. Indeed, the evidence in the case would support a much larger verdict. There is no error in the record.

Judgment affirmed, at costs of appellant.

Contributory negligence. — Effect of knowledge of the defect as showing contributory negligence. *St. Louis, etc., R. Co. v. Box*, 1 Am. R. R. & Corp. Rep. 226; *Seeley v. Southern Pac. R. Co.*, ante.

LEHR V. STEINWAY & HUNTER'S POINT R. Co.

(23 N. E. R. 889; 118 N. Y. 556.)

1. **HORSE RAILROADS. NEGLIGENCE. QUESTIONS FOR JURY.** Plaintiff with his wife entered a horse-car for which a crowd was waiting. Plaintiff secured a seat which he gave to his wife who was unable to stand. He then rode on the rear platform until, thinking there was more room in front, he sought the front platform where he stood with one foot on a step and one on the platform, clinging to the railings with his hands. A movement of the passengers loosened his hold and he fell under the car and was injured. Held, a case to go to the jury, both as to the defendant's negligence and the contributory negligence of the plaintiff.

2. **OVERLOADING CAR.** The jury were properly instructed that if the defendant negligently permitted the car to be overloaded and that the overloading caused the accident, the defendant would be liable, unless the plaintiff was guilty of contributory negligence.

3. **CONTRIBUTORY NEGLIGENCE. GIVING SEAT TO LADY.** It cannot be held as matter of law, that a passenger surrendering his seat to one less able to stand than himself, contributes to an injury caused by the carrier's negligence, but which would not have been received had he remained in his seat.

George W. Wingate for appellant. *Louis S. Phillips* for respondent.

FOLLETT, C. J. Appeal from a judgment of the general term

of the second department, affirming a judgment entered on a verdict. In 1886 the defendant owned, and operated with horses, a street railroad extending from the ferry, at Hunter's Point, eastwardly, through Long Island City. Between three and four o'clock in the afternoon of Sunday, July 18, 1886, the plaintiff, accompanied by his wife, and by a girl about seven years old and her father, stood waiting at the ferry (the western end of defendant's line), to take a car for Bowery Bay Beach, a pleasure resort on the line of the road. More persons were waiting for a car than could be carried. A car approached from the east, and as soon as its passengers were discharged the plaintiff pressed forward, and secured a seat for the purpose of giving it to his wife, who, by reason of an injury, was unable to stand and sustain herself by grasping a rod or strap. When his wife entered the car he gave his seat to her, and she took and carried the girl on her lap until the plaintiff was injured. The plaintiff remained standing by his wife until their fares were collected. His friend, the father of the girl, found standing room on the front platform, where he rode until after the accident. After the plaintiff had paid the fares, he made his way to the right side of the rear platform, where he rode for a while, and afterward stood on one of the steps, steadying himself by holding on to the hand-rail. This platform and the steps being crowded with passengers, and the plaintiff seeing that there was more standing room on the front platform, stepped from the moving car, and walked rapidly by the right side of it to the front platform, for the purpose of securing a better place to stand. This platform was so crowded that the plaintiff was unable to fully accomplish his purpose, but he boarded the car in safety, and stood with his left foot on the step and his right foot on the platform, and clung with his right hand to the rail of the dasher, and with his left to the hand-rail at the end of the body of the car. After riding in this position for a short distance, a movement of the passengers on the platform broke the hold of his right hand, which he was unable to regain; and thereupon he was forced by the pressure of the crowd from the steps, and fell underneath the car, the wheels of which passed over and crushed his left leg, rendering amputation at the knee necessary. Before the plaintiff left the rear platform he asked the conductor to stop the car, so that he might go to the front

platform, but, receiving no reply, he, the conductor, and one Norton stepped from the rear platform at about the same time, and walked by the side of the car, for the purpose of reaching the front platform. His action and disclosed purpose were not objected to by the conductor or driver. After the plaintiff lost the support of his right hand, and before he fell, he called to the driver to stop the car, but he did not until the car had passed over him. There is some evidence that the front platform was so crowded that the driver could not readily and efficiently operate the brake. These are the essential facts upon which the plaintiff bases his right to recover, and this court must regard them as established by the verdict.

The defendant moved for a nonsuit, on the grounds that the plaintiff had failed to establish that defendant negligently caused the accident, and that he had not affirmatively shown that he did not negligently contribute to the accident. The motion was denied, and the defendant excepted. The court ruled that there was no evidence that the road or car was defective, or that the defendant negligently employed an unskillful or incompetent conductor or driver; but instructed the jury that if they found that the defendant negligently permitted the car to be overloaded, and that the overloading caused the accident, the plaintiff could recover, unless the accident was caused in part by some negligent act of his which was a contributing cause of the accident. The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated and due care avoided, is negligence on the part of a carrier. It clearly appears that the defendant undertook to carry more passengers than could sit and stand within the car, and that both platforms and their steps were filled to their utmost capacity. The action of persons so crowded together, and the great force which they exercise, sometimes almost unconsciously, on each other, is understood by carriers of passengers and their employes; and the court would not have been justified in nonsuiting the plaintiff, and holding, as a matter of law, that the exercise of reasonable foresight would not have led the defendant to anticipate that overcrowding this car and its platforms might render accidents like the one which befell the plaintiff probable. Whether the defendant was negligent in carrying so many passengers was a question of fact for the jury. The

court properly refused to instruct the jury that the plaintiff was negligent in surrendering his seat to his wife, and seeking a place on the platform. It cannot be held, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself contributes to an injury caused by the carrier's negligence, but which would not have been received had he remained in his seat. The evidence in respect to the speed of the car, and the circumstances under which the plaintiff attempted to enter on the front platform, would not have justified the court in ruling, as a matter of law, that the plaintiff contributed to his own injury by making the attempt; but properly left it, as a question of fact, for the jury. Whether the plaintiff was crowded from his position by persons entering on the opposite side of the front platform for the purpose of being carried, or by some movement of those whose fares had been collected, does not very clearly appear. It is not asserted that any person willfully or intentionally crowded the plaintiff from his position, and *Putnam v. Railroad Co.*, 55 N. Y. 108, and kindred cases, are not in point. The defendant made no attempt to show that persons entered on the car against the wish or protest of the conductor or driver, or that the rules of the defendant required that the car should not be overloaded, or that the conductor and driver made any attempt to prevent the car from being unduly crowded. Whether the defendant negligently caused the injury to the plaintiff, and whether he negligently contributed to his own injury, were, under the evidence, questions of fact for the jury; and, finding no error in the submission of the case, the judgment should be affirmed, with costs.

All concur, except Brown, J., not sitting.

CONTRIBUTORY NEGLIGENCE — RIDING ON PLATFORM OF CAR.

1. *Street-cars.*—It has been often adjudicated that it is not *per se* negligence for a person to ride upon the platform of a street-car. *Messel v. Lynn & Boston R. Co.*, 8 Allen, 234; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, affirming 82 Barb. 657; *Ginna v. Second Ave. R. Co.*, 67 N. Y. 596, affirming 8 Hun, 494; *Nolan v. Brooklyn City, etc., R. Co.*, 87 N. Y. 68; *Hayes v. Forty-Second St., etc., R. Co.*, 97 N. Y. 259; *Hadencamp v. Second Ave. R. Co.*, 1 Sweeney, 490; *Hourney v. Brooklyn City R. Co.*, 7 N. Y. S. 602; *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537; *Burns v. Bellefontaine Ry. Co.*, 50 Mo. 139; *Hunt v. Missouri R. Co.*, 14 Mo. App. 160; *City Ry. Co. v. Lee*, 50 N. J. L. 435; *Topeka City Ry. Co. v. Higgs*, 38 Kans. 375; *Passenger Ry. Co. v. Boudron*, 92 Penn. St. 475; *Germantown Pas-*

senger Ry. Co. v. Walling, 97 Penn. St. 55, affirming 13 Phila. 309; Augusta, etc., R. Co. v. Renz, 55 Ga. 126. No distinction appears to be made in the cases between the front and the rear platforms, though the case last cited would seem to imply that the passenger should first seek a position inside the car, then on the rear platform and last of all on the front platform. In most of the cases cited the cars were crowded, but the reasoning of the cases is to the effect that it is not necessarily negligence to ride on the platform, even though there is room inside the car. In Maguire v. Middlesex R. Co., 115 Mass. 239, the defendant requested the court to instruct the jury that if the plaintiff was standing on the front platform of the car when there was room for him to have gone inside he could not recover. But the court declined to so rule, and left it to the jury to determine, under all the circumstances of the case as proved, whether or not the plaintiff had shown that he was in the exercise of due care at the time of the accident. In Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63, the plaintiff was smoking and took a position on the front platform, where smokers were required to ride, although there were vacant seats inside, and it was held that the question of contributory negligence was for the jury. It would seem that, if a person may ride on the platform in order to gratify his desire for smoking, he might, with equal propriety, ride there in order to gratify any other desire, such as getting the fresh air or a better view. It being customary for persons to ride on the platforms, and there being no notice or warning to the contrary, it cannot be pronounced negligence, as matter of law, to do so, even though there is room inside. Hunt v. Missouri R. Co., 14 Mo. App. 160; Augusta, etc., R. Co. v. Renz, 55 Ga. 126; Ginna v. Second Ave. R. Co., 67 N. Y. 596; S. C., 8 Hun, 494.

In Solomon v. Central Park, etc., R. Co., 1 Sweeney, 298, it was held to be negligence *per se* for a boy nine years of age to ride sitting on one of the steps of the front platform. So in Ashbrook v. Frederick Ave. R. Co., 18 Mo. App. 290, it was held to be negligence to ride on one of the front steps when there was room inside. In Ward v. Central Park, etc., R. Co., 11 Abb. Pr. (N. S.) 411, where the plaintiff stood on the edge of a crowded platform, when he could have gone inside, though persons were already standing there, and when he knew that the tracks were in bad condition by reason of snow and ice, a nonsuit was granted and sustained, where the plaintiff was on the front platform contrary to the rules of the company and the warning of the driver it was held he could not recover. Wells v. Lynn & Boston R. Co., 139 Mass. 351. And it is presumptive negligence for a passenger to ride on the front platform contrary to the rules of the company, of which he is aware, though invited to do so by the driver. Baltimore, etc., R. Co. v. Wilkinson, 30 Md. 224. The driver's invitation to occupy a position of palpable danger will be no excuse to the passenger. Downey v. Hendrie, 46 Mich. 498. In this case the car was operated without a conductor. The plaintiff passed through the car, where there were vacant seats, deposited his fare, and, being invited by the driver, seated himself on the front rail of the driver's platform. Shortly after he lost his balance, fell under the car and was injured. It was held he could not recover.

It would seem to be presumptively negligent to ride on the steps of a street

car, no qualifying facts appearing. *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135. But where there is no other room on the car and there is the express or implied consent of the company to ride in that position, it is not necessarily negligent to do so. The consent of the company may be manifested from stopping the car to receive a passenger when there is no other room to be had, collecting fare from him, or by a custom to carry passengers in that position. In each of the following cases, riding on the steps of a car under such circumstances was held to be no bar to a recovery: *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, affirming 83 Barb. 657; *Hadencamp v. Second Ave. R. Co.*, 1 Sweeney, 490; *Germantown Passenger Ry. Co. v. Walling*, 97 Penn. St. 55, affirming 12 Phila. 309; *Topeka City Ry. Co. v. Higgs*, 38 Kans. 375; *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537; *City Ry. Co. v. Lee*, 50 N. J. L. 435; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230. In the last case the passenger was riding on the side step of a sleigh barge.

In *Quinn v. Second Ave. R. Co.*, 67 N. Y. 596, it was held to be not necessarily negligent for one riding on the front platform of a car not to hold on to the iron railings.

Deceased was riding on the steps of a street car, holding on to the iron railing over the window. The car was crowded, and there was no other place for him to ride. He was brought in contact with a car standing on a switch track and thereby crushed and killed. A judgment for the plaintiff was affirmed. The court says: "Now, in the case under consideration, the evidence shows that the railroad company were in the habit of carrying passengers on the platforms of its cars, and collecting fare for the same. The position in which the deceased placed himself was perhaps unsafe, but it was not prohibited; and the evidence further shows, that owing to the crowded state of the cars, there was no other place he could take. Had there been any objection to carrying him in that manner, it would have been competent for the company or its employes to have put him off the car; but not having done so, they were bound to carry him with skill, prudence and care. There is nothing to show that he failed to exercise ordinary prudence and care. He might in all probability have avoided the catastrophe by being on the alert and exercising extraordinary vigilance, but such was not required of him. He stood within a few feet of the driver, and the driver knew, or at least it was his duty to know, the close proximity of the cars when they were about to collide, and also the position of the passengers on the platform. His driving steadily ahead, under such circumstances, stamps the act with recklessness and gross negligence. The question of negligence was for the jury, and was properly submitted to them under instructions which fairly and correctly presented the true issue in the case and the law arising therefrom." *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537, 553.

The accident in *Topeka City Ry. Co. v. Higgs*, 38 Kans. 375, was of a very similar nature. The plaintiff, who was a cripple, was riding on the side-step of an open horse-car, and was injured by contact with another car going in an opposite direction on a switch. The case presents some peculiar points which are thus discussed in the opinion:

"Objection is made to instructions four and six, wherein the court instructs the jury that the mere fact that the plaintiff Higgs was riding on the step of

the car would not defeat his right to recover, if it was customary to ride there and the car was so crowded he could not procure a seat, and if he rode there without objection from the conductor or other employe of the company; and it is said they were clearly wrong because there was no evidence of any permission to ride on the step, and because the evidence was undisputed that the plaintiff Higgs had been distinctly warned against riding there; and the case of *Huelsenkamp v. Ry. Co.*, 34 Mo. 45, is cited and claimed to be decisive on this question. What are the facts as developed by the witnesses produced by the plaintiff in error? The superintendent said: 'I said to Higgs, don't try to get onto the cars while there is such a rush; as soon as I can, I will get you a seat;' but he never did any thing more than to talk to him; made no effort to furnish a seat. It is not in terms a warning not to ride on the foot-board; it is an expression of fear that, as he was crippled, he might get hurt in the rush, coupled with a promise to get him a seat. He did not get hurt in the 'rush,' and he did not get a seat. The superintendent also stated that at the reunion it was customary for persons to ride on the foot-boards on the platforms of the cars, and even on the top of the cars, and that the conductors collected fare from them wherever they rode, but they were requested not to so ride by him; that on all cars that started after he had promised Higgs to get him a seat, persons were riding on the foot-boards; that upon all the cars coming to and going from the city, the company allowed men, women and children to continuously ride upon the front platform, the rear platform, and also upon the foot-boards of the cars, and collect fare from them; that fare was collected from men riding on the top of the cars the same as if they had ridden on the inside of the cars; that the seating capacity of an open car is twenty-five persons, and it carried from that number to eighty persons; that it stopped to receive passengers and allowed them to get on long after the seats were all occupied; that fare was collected if they got on the car, without reference to whether they had a seat or not. The conductor of the car said that it was a fact that passengers continually rode on the foot-boards, and sometimes on the top of the cars, and he collected fare from them. These citations from the evidence in the record abundantly establish the proposition that on this occasion the defendant in error had permission to ride on the foot-boards, and had not been distinctly warned against riding there. These facts justify the instructions complained of. The case cited was reversed, because no such permission was proved or shown on the trial below; here it was shown conclusively, by the witnesses of the plaintiff in error, that the usage and practice whenever there was a large crowd to be accommodated, was for men, women and children to continually ride on the foot-boards, and that fare was always collected from them. * * * It is unquestioned that the company can make all such rules respecting the manner in getting on and off the cars, the place where passengers are to ride, and every other reasonable regulation that conduces to the safety and accommodation of the persons to be carried over its line, and has the undoubted right to insist on their due observance; but having done so, the company must not be the first to violate them or depart from their requirements, so that if it is permitting men, women and children, on public occasions, where there is a large number of persons to be carried, to ride on the foot-boards of its cars, it

cannot relieve itself of liability for an injury to a person on the foot-board by a warning and a promise of a seat. The defendant in error had the same right to ride on the foot-board of the car as any other passenger whom they carried on that day. If, on account of his crippled condition, he had been injured by people rushing to get on or off the cars of the company, of course no liability would attach to the company on account of such an injury. His crippled condition did not change his rights or vary the duties and obligations of the company as a carrier of passengers, in any respect, except that he was entitled to a longer time in which to get on or off the cars than a passenger who was not crippled or infirm. He was not injured by reason of his crippled condition, nor is there any evidence which shows that such condition, either directly or indirectly, contributed in any manner to the injury."

Deceased hailed a crowded street car, and, being unable to get on the rear platform, went to the front and managed to squeeze in between two men and get a footing on the step, holding on by both hands. In rounding a curve, a movement of the passengers broke the deceased's hold and he fell under the car and was killed. A verdict and judgment for the plaintiff were affirmed. The court says: "Conductor, driver and passengers acted as if there was room, so long as a man could find a rest for his feet and a place to hold on with his hands. Nor was that action exceptional. Notoriously it was very common in 1876, and, perhaps, is not infrequent at this day. The companies do not consider such practice dangerous, for they knowingly suffer it and are parties to it. Their cars stop for passengers when none but experienced conductors could see a footing inside or out. The risk of traveling at the rate of six miles an hour is not that when the rate is sixty, or even thirty. An act which would strike all minds as gross carelessness in a passenger on a train drawn by steam-power, might be prudent if done on a horse-car. Rules prescribed for observance of passengers on steam railroads, which run their trains at great speed, are very different from those on street railways. In absence of express rules, every passenger knows that what might be consistent with safety on one would be extremely hazardous on the other. Street railway companies have all along considered their platforms a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous, that one who pays for standing there can recover nothing for an injury arising from the company's default?" *Germantown Pass. R. Co. v. Walling*, 97 Penn. St. 55, affirming *Walling v. Ry. Co.*, 12 Phila. 809.

In *City Ry. Co. v. Lee*, 50 N. J. L. 485, plaintiff was also riding on the side-step of an open car, and was knocked off and injured by coming in contact with a person standing on the side-step of a similar car going in the opposite direction. A judgment for the plaintiff was affirmed by the court of errors and appeals.

In *Messel v. Lynn & Boston R. Co.*, 8 Allen, 234, the court says: "The seats inside the cars are not the only places where the managers of the train expect the passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside until the car is full, and then to stand upon the platforms until they are full, and continue to stop and receive them even after there is no place for them to stand except upon the steps of the platforms. Neither the officers of these corporations nor the managers of the cars

nor the traveling public seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained, upon the ground of its danger."

In *Passenger Ry. Co. v. Boudron*, 92 Penn. St. 475, the plaintiff was riding on the rear platform of a crowded horse-car. While the car was stopped to take on passengers the plaintiff, who was leaning with his back against the dasher, was struck by the pole of a following car and severely injured. The cause of the accident was the breaking of the brake-chain of the latter car. The court held that even though it was negligence for the plaintiff to be upon the platform, yet, as matter of law, it was not negligence contributing to the injury. The court says: "The large number of passengers in this city, who voluntarily stand upon the platforms, because there is neither sitting nor standing room in the cars, do not, and ought not, anticipate that they will be run over by following cars. Their position has no tendency to induce the driving of one car into another. Whatever the degree of their negligence in riding on the platform, and the risks they take in so doing, every one knows that so long as he remains there, he is in no danger of being run down by a car, unless from its heedless handling. When the plaintiff was struck, his post was a condition, but not a cause of his injury. It neither lessened the speed of the car he was on nor increased that of the other; his presence was not a cause of the broken chain and reckless driving of car 14; his place was an incident of an overcrowded car, whose conductor had left the platform to give him standing-room, and had not pointed him to a seat or requested him to enter the car." The reasoning in *Dewin v. Boston & Maine R. Co.*, 148 Mass. 343, 347, supports the same conclusion.

In *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39, the deceased, who was a boy of nine, took a seat in a horse-car and paid his fare. As the car filled with passengers the conductor compelled the boy to give up his seat, against the latter's objections, and the deceased was finally pushed and crowded by the passengers onto the front platform, which was also crowded. While there and while the car was in motion, there was a rush of a passenger to leave the car, and the deceased was thrown off and received injuries of which he died. On the trial of the case the defendant moved for a nonsuit which the court denied, and there was a verdict and judgment for the plaintiff, which were affirmed. On the question of the nonsuit we quote from the opinion as follows:

"The defendants insist that the motion for a nonsuit should have been granted, urging that there was negligence on the part of the deceased in occupying a position upon the platform, and that the defendants were no more responsible than if the boy had been shot with a revolver or struck with a club by a fellow-passenger. The question of the negligence of the deceased in remaining upon the platform was submitted to the jury, under the instructions hereafter to be considered. For the present we are to assume that the deceased was upon the platform by the express requirement of the defendants, and against his own remonstrance, properly, so far as the defendants are concerned. If by the motion of the cars he had been thrown from his dangerous position, or by the continued pressure of the large crowd which the defendants had permitted upon their cars, he had been pushed from his standing-place, the defendants

would have been liable. It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be that the young man was not justified in rushing through the crowd, and in aiding in throwing the deceased from the cars; but this does not relieve the defendants' wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by the illegal act of the young man. It was his violence concurring with the defendants' illegal conduct, in overcrowding their cars, and in placing the deceased upon the platform, that produced the disastrous result. It is no justification for the defendants, that another party, a stranger, was also in the wrong." *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39, 40.

The plaintiff, a passenger on a street-car, after signaling the conductor to stop, walked to the rear platform where he stood for a short time expecting the car to stop. He was not holding on to any thing. There were snow and ice on the platform and it was somewhat uneven and slippery. A jolt of the car caused the plaintiff to slip and fall from the platform, causing the injuries sued for. It was held error to direct a verdict for the defendant. *Fleck v. Union Ry. Co.*, 134 Mass. 480.

It is not negligence *per se* for a passenger to stand up between the seats of an open street-car. *La Pointe v. Middlesex R. Co.*, 144 Mass. 18.

2. *Steam railroads.*—All the cases recognize a wide difference between street railroads and steam railroads in respect of the danger from riding on the platforms of the cars. To ride upon the platform of the ordinary steam railroad car is *prima facie* negligence, and one who does so when there is room to sit or stand within the car without discomfort, cannot recover for any injury which is the natural or obvious result of such a position in connection with the ordinary motions of the car or movements of the people in it. *Quinn v. Ill. Central R. Co.*, 51 Ill. 495; *Camden, etc., R. Co. v. Hoosey*, 99 Penn. St. 492; *Dewire v. Boston & Maine R. Co.*, 148 Mass. 343. And see *Chicago, B. & Q. R. Co., v. Colwell*, 8 Ill. App. 545; *Walter v. C. D. & M. R. Co.*, 39 Iowa, 83; *McAurich v. Miss. & Mo. R. Co.*, 20 Iowa, 338.

But such a position is not always and as a matter of law, negligence. If a railroad company receives passengers in such numbers that they cannot all find seats or convenient standing-room inside the cars, and some are compelled to ride on the platforms, then such persons are there by the consent of the company, and the fact that they are riding on the platform will not preclude a recovery for injuries sustained through the negligence of the company. *Werle v. Long Island R. Co.*, 98 N. Y. 650; *Willis v. Long Island R. Co.*, 34 N. Y. 670; *Colgrove v. New York, etc., R. Co.*, 20 N. Y. 492, affirming 6 Duer, 882.

In *Dewin v. Boston & Maine R. Co.*, 148 Mass. 343, it appeared that the plaintiff boarded a train of defendant's and passed through the several cars in a vain search for a seat. While standing on the platform of one of the rear cars, looking into the car for a seat, a collision occurred, and he was injured. The trial court ruled that if the plaintiff was on the platform for the purpose of riding there he could not recover, but if he was there for a reasonable time in trying to secure a seat, he might recover, and this ruling was held to be as favorable to the defendant as it was entitled to have. The court says:

"In the case at bar we think there was no want of ordinary care on the part of the plaintiff, so far as any injury from collision was to be apprehended, and that the plaintiff's conduct did not contribute in any degree to bring about the collision or the injury which resulted from it. There is no evidence that the consequences of the defendant's negligence could have been avoided by the exercise of reasonable care on the part of the plaintiff. The presence of the plaintiff upon some part of the train which was struck or displaced by the colliding engine was a necessary condition of the plaintiff's being injured thereby, but it was not in a legal sense a contributing cause of the injury."

3. *Elevated railroads.* — The rule in regard to elevated railroads does not vary materially from that which applies to steam railroads. A position on the platform of an elevated railroad car is obviously one of great danger, and this fact imposes corresponding duties on both the company and the passenger. In *Mervin, Admx., v. Manhattan Ry. Co.*, 48 Hun, 608, the facts are thus stated by the court: "The plaintiff's intestate was killed by falling between the cars of a train on the Third Avenue Elevated railroad, between six and seven o'clock, P. M., on September 18, 1884. He got on board the train, which was going up-town, at the Forty-second Street station. According to the testimony for the plaintiff, the cars, including the platforms, were terribly crowded, so that it was almost impossible for the plaintiff's intestate and his companion to get on. There were four cars on the train and they stood on the rear platform of either the first or the second car. Upon leaving Sixty-seventh street there were from twelve to fifteen people on each platform, and the aisle of the car was filled with people standing. As the train approached Seventy-sixth street, where the deceased intended to alight, passengers began to come out on the platform preparatory to getting off. The deceased was standing near the edge, and in consequence of the pressure made by the out-coming passengers, stepped back, falling between the platforms. He was instantly killed. There is some evidence that just before the fall the cars 'jogged together,' and that the jolt thus produced had some influence in causing him to lose his foot-hold. There was nothing across the opening through which the deceased fell, nor in any way extending from the railing of one platform to the railing of the other."

It was held that the company was guilty of negligence in not having foreseen and provided against such accidents and, on the question of the contributory negligence of the deceased, the court says:

"But it is urged that a verdict should have been directed for the defendant, on the ground that the plaintiff was guilty of contributory negligence in getting on a crowded car when it was perfectly obvious that he would have to stand on the edge of the platform. As a matter of law, however, it was not contributory negligence for him to board the train under the circumstances disclosed by the record. *Werle v. Long Island R. Co.*, 98 N. Y. 650. Although the platform is described as having been terribly crowded, it does not appear that the deceased perceived that he would have to stand on the edge of the platform, or that he did in fact stand on the edge of the platform throughout the journey. According to the witness Coogan, who was also a passenger on the platform, the deceased first stood at a point which, as shown

in a diagram in the appeal book, must have been very near the middle of the platform. Even if it was obvious to the deceased that he would not be able at once to find place inside the car, the defendant, by taking him upon the train *for the purpose of transporting him as a passenger upon the platform*, was bound to exercise a high degree of care to make the platform safe and secure for his occupation, and he was entitled to assume that it would do so. His knowledge of the construction of the platform, and the consequent insecurity could hardly have been as full or accurate as that of the defendant's officers and agents. Whether he was guilty of contributory negligence in any thing he did thereon was a question for the jury." A judgment for the plaintiff was affirmed.

TOLEDO TIE & LUMBER CO. V. THOMAS ET AL.

(11 S. E. R. 37; 83 W. Va. 566.)

1. CORPORATIONS. EQUITY. PLEADING. Where the defendant in an equity suit files a plea in abatement in proper form, and at the proper time, and at the same time files his answer formally pleading the same matters therein, and said answer is duly sworn to, the said matter in abatement will be treated as properly put in issue, although the said plea is not sworn to.

2. FOREIGN CORPORATIONS. MAKING CONTRACTS BEFORE COMPLYING WITH DOMESTIC STATUTES. A contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business in another state will not on that account be held absolutely void, unless the statute expressly so declares; and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others.

3. WHETHER SUCH CONTRACTS MAY BE ENFORCED. Our statute (section 30, chapter 54, Code) which prescribes that foreign corporations shall comply with certain regulations as a prerequisite to their right to hold property or do business in this state, and fixes a penalty for their failure to do so, does not make the contracts made in this state by such corporations before compliance with said regulations absolutely void and unenforceable in the courts of this state.

4. PRACTICE. DISSOLVING PRELIMINARY INJUNCTION. A cause in which it is held that the court did not err in overruling a preliminary motion to dissolve an injunction made before the final hearing of the cause on its merits.

Simpson & Howard, Gunn & Gibbons and Simpson & Thomas for appellant. *Tomlinson & Wiley and Kenna & Chilton* for appellees.

SNYDER, P. On November 21, 1888, the Toledo Tie and Lumber Company entered into a written contract with W. W. Thomas for the purchase of seventy-five thousand ties at the price of thirty-two cents per tie for all first-class ties, and twelve cents per tie for

all second-class ties, to be delivered at Point Pleasant, in this state, on board the cars, by June 1, 1889, or as soon thereafter as the rises in the streams will permit; and further, the said company agreed to advance to said Thomas eighteen cents per tie on all first-class, and five cents per tie on all second-class ties, when such ties shall have been inspected and branded on the banks of Eighteen Mile creek, in Putnam county, W. Va.; and said company shall have the right to take possession of all ties so inspected and branded on which it has made such advances, wherever they may be found, in case the said Thomas fails to deliver the same. It is also agreed that the eighteen cents per tie advanced as aforesaid shall be considered full payment for said ties when so inspected; and the said Thomas binds himself to raft and deliver said ties on the cars at Point Pleasant, as aforesaid, and he shall there be paid the additional sum of fourteen cents per tie on first-class and seven cents per tie on second-class ties. Under this contract Thomas commenced getting out and delivering ties, but before completing his part of the contract he became financially embarrassed, and by deed dated July 10, 1889, he assigned to J. C. Thomas and Rufus Switzer, trustees, for the benefit of his creditors, all his choses in action, and the benefit of all contracts which he had with any person whomsoever. A few days after said assignment, to-wit: on July 15, 1889, the said Toledo Tie and Lumber Company presented to the judge of the circuit court of Mason county their bill against the said W. W. Thomas, and said J. C. Thomas and Rufus Switzer, trustees, and obtained from said judge an injunction restraining and inhibiting the said defendant from stopping or interfering with the said company in loading and shipping said ties. At the August rules, 1889, the plaintiff filed its bill, with the injunction thereon, as aforesaid, in the said Mason county circuit court, and at the same rules the defendants filed thereto two special pleas, a general demurrer, and their answers to the plaintiff's bill. The plaintiff demurred to each of said special pleas, and the cause was, on August 13, 1889, heard on the said pleading, depositions, and the motion of the defendants to dissolve the injunction and the court sustained the demurrers to said pleas, and overruled the motion to dissolve the injunction, and from this order the defendants, J. C. Thomas and Rufus Switzer, trustees, have appealed to this court.

It is insisted that the court erred in not dismissing the bill for want of jurisdiction. The defendant's first special plea avers that the supposed cause of action alleged in the bill did not, nor did any part thereof, arise in the county of Mason; that the same arose within the county of Putnam, in this state; and that at the time of issuing the writ in this suit the defendant resided, and still resides, in Putnam county. This plea is not sworn to, and is, therefore, not good as a plea in abatement. But the defendants, at the same rules at which the plaintiff filed its bill, filed their answers, in which they formally plead and rely upon the same matters alleged in the said first special plea, and the answer is sworn to in due form. I think, therefore, taking this plea and answer together, the defendants were entitled to an abatement of the suit, provided the facts alleged are sufficient for that purpose, and said facts should be proved. Our statute (sections 1, 2, chapter 123, Code 1887) provides that suits of the class to which this suit belongs shall be brought either in the county wherein any of the defendants reside, or wherein the cause of action, or any part thereof, arose. The defendants, as we have seen, plead that none of them reside in Mason county, and that no part of the cause of action arose in said county; but, on the contrary, they all reside in the county of Putnam, and every part of the cause of action arose in said county; therefore, if these allegations be true, the express mandate of the statute is that this suit should have been brought in Putnam county, and, per sequence, it was improperly brought in the county of Mason.

The appellants further insist that the court erred in sustaining the demurrer to the said second special plea. This plea, in effect, avers that the plaintiff is a foreign corporation, created and organized under the laws of the state of Ohio; that the contract alleged in the plaintiff's bill was made in Putnam county, in this state, and that from January 1, 1889, and continuously thereafter up to the time of the institution of this suit, the plaintiff, as such corporation, did transact divers other business in the counties of Putnam, Mason and Kanawha, of this state, and that it did not, at that time, or at any time before the institution of this suit, comply with any of the requirements of section 30 of chapter 54, Code 1887, of this state; and, therefore, the defendants pray that the suit be abated. This plea raises the important question of the

true interpretation of said statute. Among other provisions, the said statute declares, in substance, that any corporation created by the laws of any state or foreign country "may, unless it be otherwise expressly provided, hold property and transact business in this state upon complying with the requirements of this section, and not otherwise." It then requires such corporation to file a copy of its charter with the secretary of state, and file in each county in which it does business a certificate of the secretary of state that it has so filed such copy of its charter in his office; and it further provides that "every such corporation which shall do business in this state without having complied with the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$500 nor more than \$1,000 for each month its failure so to comply shall continue." In the absence of any statute limiting the right of a corporation to do so, it may, unless contrary to the public policy of the state, hold property and do business without as well as within the state or county by which it was created. *Ang. & A. Corp.*, §§ 372-376; *Field Corp.*, § 363. This statute, being not only in derogation of common law, but penal in its character, must be construed strictly. There is certainly no public policy of this state which is contravened by permitting corporations such as the plaintiff here to do business in the state, because the statute expressly authorizes them to do so upon compliance with its requirements. The evident purpose of these requirements of the statute is to protect parties dealing with foreign corporations from imposition, and to secure convenient means of obtaining jurisdiction in the local courts of the state, and information such as will facilitate the service of process upon such corporations.

It is clearly not the primary purpose of the legislature, in passing such statutes, to render the contracts and dealings of such corporations which have not complied with these requirements void and unenforceable. Hence the decided weight of authority is that, where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was enacted. Upon this ground it has been held that a contract made by a foreign corporation before it has complied with the

statutory prerequisites to the right to do business will not, on that account, be held absolutely void, unless the statute expressly so declares; and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others. *Insurance Co. v. Walsh*, 18 Mo. 229; *Insurance Co. v. McMillen*, 24 Ohio St. 67; *Ehrman v. Insurance Co.*, 1 McCrary, 123; 1 Fed. Rep'r, 471; *Insurance Co. v. Salt Co.*, 31 Mich. 346; *Insurance Co. v. Matthews*, 102 Mass. 221; 2 Mor. Priv. Corp., § 665. We are aware that the courts of Indiana, Illinois, Wisconsin, and perhaps some other states hold a different doctrine. In Vermont and Oregon it has been held that a non-compliance with the precedent conditions of the statutes of those states by foreign corporations rendered their contracts void. But it will be observed that these statutes imposed no penalty for the failure to comply with their provisions; and it is principally upon this ground that the contracts are held void, because otherwise the statute might be evaded with impunity. Thus in *Bank v. Page*, 6 Ore. 431, 436, the court say: "The general rule is that a contract in violation of law is void. The only exception to the rule is that, when a law imposes a penalty for the prohibited act, and it clearly appears that the legislature intended no more than to impose the penalty for the violation of the law, a contract made in violation of such a statute is not void." It is evidently the want of such penalty in the statute that influenced the court to hold the contract void. And such seems to be the ground of the decisions in Indiana and other states. *Machine Co. v. Caldwell*, 54 Ind. 273; *Lester v. Bank*, 33 Md. 558. The authorities on this question are reviewed in 2 Mor. Priv. Corp., §§ 662-666, and the author announces as his conclusion therefrom that, "unless it appears affirmatively that the legislature intended to render a forbidden act or contract, absolutely void in legal contemplation, it will not be so held;" citing *Bank v. Matthews*, 98 U. S. 621, 627. Let us apply these principles to our statute. The first provision is that the foreign corporation may do business in this state "upon complying with the requirements of this section, and not otherwise." It next declares that such corporation, so complying, shall have the same rights and privileges, and be subject to the same liabilities, as domestic corporations; and it finally imposes

a penalty upon such corporation for its failure to comply with the regulations of the statute. There is here no express declaration that the failure to comply shall render the contracts of the corporation absolutely void. Nor does it affirmatively appear that the legislature so intended. But it is expressly provided, and so declared, that a failure to comply with the regulations prescribed shall be punished by fine; and this imposition of a penalty, as we have seen, in the absence of any express declaration to the contrary, must be held to be exclusive of all other penalties. That such was the purpose of the legislature in enacting this statute, is manifest from the provision therein in respect to railroad corporations. It prescribes additional regulations for such companies, and declares that, unless they are complied with, such companies shall not maintain any action or suit in this state. The whole section shows no purpose to treat railroad corporations with more favor than other corporations; yet, if we hold the contracts of all other corporations absolutely void, while only denying to railroad companies the right to sue in our courts, the effect would be to discriminate in favor of the latter. Upon the whole, I am of opinion that the court did not err in sustaining the demurrer to said second special plea.

It is further contended by the appellants that there is no equity in the plaintiff's bill, and that the injunction should have been dissolved for the want of jurisdiction in the equity court. The bill, after setting out the contract before referred to between the plaintiff and defendant W. W. Thomas, avers that, under said contract, said Thomas had delivered to the plaintiff about ten thousand ties, for which it paid him in full; that Thomas, on the recent rises in the streams, had run down Eighteen Mile creek about thirty-five thousand ties, the most of which are in the Kanawha river and some of them have been put into rafts, preparatory to shipment and delivery to the plaintiff at Point Pleasant; that the plaintiff had inspected and branded said ties, and paid Thomas in full for the same, and taken possession of them before they had been run down Eighteen Mile creek; that after said ties had been run down said creek to the Kanawha river, and some of them were at Point Pleasant in Mason county, and were being loaded on the cars, the defendants J. C. Thomas and Rufus Switzer, trustees, by their threats and in-

terference with the agents and employes of the plaintiff and the railroad company, openly and wantonly prevented and stopped the plaintiff from loading, and the railroad company from receiving and shipping any of said ties. It seems to me these facts, which are more formally and specifically set forth in the bill, are sufficient, if sustained by proof, to entitle the plaintiff to relief in a court of equity. A large mass of depositions were filed by either side; but, as no final decree or order settling the principles of the cause was made by the court — this appeal being simply from an order refusing to dissolve the injunction awarded the plaintiff — it is not incumbent upon this court to pass upon the proofs further than to decide, as we do, that the court did not err in overruling the defendant's motion to dissolve the said injunction.

We are not called upon to decide, and we do not decide, in advance of final action by the court below, whether, on the proofs as they now are, or as they may hereafter be made to appear in this case, the circuit court should or should not on the final hearing dismiss the bill. All we now decide is that, as a preliminary motion, the court did not err in refusing to dissolve the injunction, and that such motion ought not to be finally acted upon until the hearing of the cause on its merits.

In reference to the objection to the jurisdiction of the circuit court of Mason county, as set forth in the defendant's first special plea and answers to the bill hereinbefore referred to, we think the proofs do not sustain the facts therein alleged. The bill avers and the proofs show that a part of the ties in controversy in this cause were at Point Pleasant, in said county, at the time this suit was commenced, and that the rights and acts of the parties in respect to said ties is part of the controversy in this suit; and, that being so, the circuit court of said county had jurisdiction, provided the process was served, as it was in this cause, on some of the defendants in said county. For the foregoing reasons, I am of opinion that the order of the circuit court refusing to dissolve the injunction should be affirmed.

English, Brannon and Lucas, JJ., concurred.

See *Farrior v. New England Mort. Security Co.*, 1 Am. R. R. & Corp. Rep. 463; *Texas Land & Mortgage Co. v. Worsham*, post.

WESTERN UNION TEL. COMPANY V. WILLIAMS.

(11 S. E. R. 106; 86 Va. 606.)

1. EMINENT DOMAIN. TELEGRAPH LINE ON HIGHWAY. FEE OF HIGHWAYS IN VIRGINIA. In Virginia, upon the establishment of a highway, the public acquire only an easement and, in the absence of evidence to the contrary, the abutting owner is presumed to own to the middle of the way.

2. STATUTES SHOULD IF POSSIBLE BE CONSTRUED SO AS TO BE VALID. One section of a statute authorized telegraph lines to be constructed on state or county roads. Another section provided for making compensation to the owners of lands over which any telegraph line should be constructed. Held, that the act should be so construed, if possible, as to be in harmony with the constitution, and, therefore, that the section authorizing the use of highways for telegraphs should be construed to mean on condition of making compensation as provided in the subsequent section.

3. An act which provides for taking private property for the use of a telegraph company without compensation is void.

4. TELEGRAPH ON HIGHWAY ADDITIONAL BURDEN. The right of the public in a highway is one of passage only, and a telegraph line is an additional burden on the same, for which the owner is entitled to compensation.

Staples & Mumford and *Robert Stiles* for plaintiff in error.
Pollard & Sands, *R. T. Lacy* and *W. W. Gordon* for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of New Kent county rendered on the 30th day of October, 1888. The plaintiff in error constructed its telegraph line upon the county road in New Kent county, where the said road ran over the lands of the defendant in error without his consent, and without condemnation proceedings, and without tendering compensation, and refusing to pay compensation therefor. As is alleged in the declaration, the defendant, "against the will of the plaintiff, and violently, against the protest of the plaintiff, entered upon the said land and cut down and destroyed the trees and underwood — fifty pine trees, twenty oak trees, and other trees, of the value of \$1,950 — and broke down and prostrated a great part of the fences of said plaintiff, and dug holes in the land of the plaintiff, and put posts there and kept the same there, etc., and incumbered the land, and hindered the plaintiff in the free use and enjoyment thereof." The defendant pleaded "not guilty," and moved the court to re-

move the case to the federal court, which motion to remove the case the court overruled, and the case proceeded to a trial; and upon the trial the jury rendered a verdict in favor of the plaintiff for the sum of \$550, upon which judgment was rendered accordingly, whereupon the defendant, the plaintiff in error here, applied for and obtained a writ of error to this court.

There were sundry exceptions taken at the trial which were assigned as error here. The first assignment which we will consider is as to the refusal of the court to give to the jury certain instructions asked by the defendant, and the giving by the court of certain other instructions. The plaintiff moved the court to instruct the jury to the following effect: That, "if the jury believe from the evidence that the defendant was, at the time of the committing of the alleged trespass in the declaration mentioned, and still is, a telegraph company chartered by this or any other state, and that the road along which it has constructed and maintained, and still is maintaining, its telegraph line in the county of New Kent, was at said time, and still is, a county road, then the said defendant had at said time, and still has, the right to construct and maintain its said line along said county road, upon any part thereof, to the width or extent of thirty feet, whether the road-bed actually used by the public was and is of such width or not, provided the ordinary use of said road be not thereby obstructed; and said defendant had at said time, and still has, the right to cut down and trim out such trees or limbs, within such width or extent of thirty feet, as might interfere with the proper and effective construction, maintenance and operation of its said line. (2) For the exercise of such right as aforesaid, the defendant is not required to obtain permission from, or to make compensation to the owner or owners of the land upon which said road is located, whether the fee-simple title to the soil upon which the road is located, or the mere easement thereon, be vested in the public. (3) The jury are further instructed that, although the road-bed of said road actually used by the public may not be or have been of the width of thirty feet, and although the overseer of said road may not have complied with the law in keeping said road clear and smooth, and free from obstructions, to the legally-required width of thirty feet, yet, under the laws and statutes of the commonwealth, the defendant company was authorized to use any

part of said legal road of thirty feet to the same extent as if said overseer had strictly complied with the provisions of law requiring him to keep said road clear of timber and other obstructions to the required width, and the whole thirty feet been actually used by the public as a road." But the court refused to give these instructions of the defendant, and gave the following: "(1) The court instructs the jury that the law presumes that the ownership of lands along the side of a public road in Virginia extends to the middle of said road, and the burden of proof is upon the party who claims otherwise to show that such is not the case along the road where the right is controverted; and the owner has the exclusive right to the soil, subject to its use for the purposes of the public, and to the right of passage of the public over the same; and, being owners of the soil, they have a right to all of the ordinary remedies for disturbing of, or injury to, their freehold or possession; and any act of the legislature which divests such owners of their rights is unconstitutional and void." (2) The fact that a road is a public road or highway does not authorize the digging of holes for the purpose of erecting telegraph posts, and the erecting of posts, and the establishing a telegraph line, over the lands of a person, without his consent, although the same may be erected or done on that part of his premises which is used as a public road." It thus appears that the claim of the defendant is that, by reason of the act of assembly of February 10, 1880 (Acts 1879-80, pp. 53, 54), it was authorized to construct its telegraph poles and line along the land over which the county road runs, without making compensation therefor, and that it maintains its right to exercise, as to these lands, the right of eminent domain thereon — to take and enjoy what belongs to another, in the exercise of the sovereign power, not only without making any compensation therefor, but without any formal proceedings looking to condemnation of this property under any of the forms of law whatever.

If it is once conceded, or in any wise established, that the land in question belonged to the plaintiff, it was his private property, his freehold; as entirely his own, throughout all its parts, as the shelter which he had erected around and over his hearthstone, for his habitation and home, and as entirely under the protection of the laws against the intrusion as the very hearthstone itself. That

these lands are the lands of the plaintiff, unless he has lost them by the creation of a public road across them, is undeniable — is, indeed, not denied. Does the creation of a public road through the land divest him of the fee in the same?

As to the extent of the right acquired by the public upon opening a highway in Virginia, Mr. Minor, in his *Institutes* (volume 1, p. 120), says: "The public acquires merely a right of passage. The freehold and all the profits of the soil (that is, trees, mines etc.) belong still to the proprietor from whom the right of passage was acquired. He may, therefore, recover the freehold in ejectment, subject to the right of way, and may maintain an action of trespass for digging the ground. If it be unknown from which of two adjacent proprietors a highway was at first taken, or if the highway be the boundary between them, they are understood to own each *ad medium filum viæ*." Citing Bac. Abr., "Highways," *b*; *Bolling v. Mayor of Petersburg*, 3 Rand. (Va.) 563; *Home v. Richards*, 4 Call, 441; *Harris v. Elliott*, 10 Pet. 25. And this subject is again referred to by Mr. Minor in his second volume, page 20, as to the ownership of land adjacent to highways when he says: "The ownership usually extends to the middle of the road, as in the case of a private stream; or, if the same party owns on both sides, the whole road belongs to him, subject to the public easement of the right of passage in either case. Citing 3 Kent Comm. 432." In the case of *Home v. Richards*, *supra*, all the judges delivered opinions, and all held that the grant of the right of way does not convey the soil, but only the right to a way over. In the case of *Bolling v. Mayor of Petersburg*, *supra* — a case fully and ably argued in this court by the foremost lawyers of that day — Judge Carr delivered the unanimous opinion of the court. Speaking as to the public highway, he said: "Does this disable the demandant from recovering the land? It certainly would not in England, as many cases show." Citing *Lade v. Shepherd*, 2 Strange, 1004. In that case the defendant rested one end of a bridge upon the highway. Upon trespass brought the court said: "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage; but it never was understood to be a transfer of the absolute property in the soil." In *Goodtitle v. Alker*, 1 Burrows, 143, in ejectment, a special verdict finding that the land was a public

street and public highway, Lord Mansfield says: "1 Rolle Abr. 392, is express 'that the king has nothing but the passage for himself and his people, but the freehold, and all profits, belong to the owner of the soil.' So do all the trees upon it, and mines under it. * * * The owner may get his soil discharged of this servitude or easement of a way over it by a writ of *ad quod damnum*. It is like the property in a market or fair. There is no reason why he should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement. * * * An action of trespass would lie for an injury done to it. * * * I see no ground why the owner of the soil may not bring ejectment as well as trespass." Mayor, etc., v. Ward, 1 Wils. 107; Harrison v. Parker, 6 East, 154. But it is said that in this country we act on a more liberal scale; that the court will look to the great principles of public policy, and give them effect; that, the conveniences of the community requiring highways, they must be had; and, as a mere right of way is not sufficient for the full enjoyment of them, we must consider the commonwealth as vested with a base fee in all public highways.

Our business is with the law as it is; and, where the power to be exercised is one of so important a character as the taking away the property of the citizen, divesting him of his eminent domain in the soil, I could not consent to take the step unless I saw myself justified by some clear principle of the common law, or some plain enactment of the statute. The English cases are pretty strong evidence that the common law confers no such power. I have looked into our statutes, and I can find nothing there to countenance the idea that where a road is established the fee in the soil, either simple or base, is vested in the commonwealth. On the contrary, I think it is obvious that a right of way is all that the public requires, leaving the whole fee in the owner of the soil. It is for the use of the land by the commonwealth that the owner is compensated. There can be no question as to what the law is in this state. It is well settled. In *Warwick v. Mayo*, 15 Gratt. 528, Judge Allen delivered the unanimous opinion of this court to the same effect. Speaking of a highway, he says, "the easement comprehends no interest in the soil," and cites Judge Swift as saying, in *Peck v. Smith*, 1 Conn. 103: "The right of freehold is not touched by establishing a highway,

but continues in the original owner of the land, in the same manner it was before the highway was established, subject to the easement." He says further: "Notwithstanding the easement, the owner retains many and valuable interests. * * * He may make any use of it not inconsistent with the employment of the easement." Hare & Wallace's Notes to *Dovaston v. Payne*, 2 Smith Lead. Cas. 190, where the authorities are collected. After speaking of the English rule, and the decisions of some of the states, he says: "In Virginia the rule has been established by an authoritative decision of the very point in accordance with the settled doctrine of the English courts," -- and refers to *Bolling v. Mayor of Petersburg*, *supra*. If these principles are thus settled in Virginia, as they certainly are, they are equally as firmly imbedded in the jurisprudence of numerous other states of this country. These are collected and cited by Mr. Angell in his work on Highways, page 396, section 301 et seq., and notes. At page 398, section 303, this author says: "The principles of the common law in this respect have been recognized and adopted by the American courts." Citing *Perley v. Chandler*, 6 Mass. 454. Under these principles the plaintiff was entitled to maintain trespass against the defendant when the said defendant stopped upon his land, instead of passing along, and dug up his soil, and cut down his trees, and tore down and scattered his fence, unless such taking of his property was by due process of law, for public uses, upon just compensation. If the use for which the land was taken was a private use, it could not be lawfully taken without his consent. But the use may be conceded to be a public use, and yet to take without just compensation was unlawful. Such taking without authority of law was a trespass and such taking could find no justification in any act of the general assembly. Art. 5, § 14, Const. Va. It is claimed that the act of assembly passed February 10, 1880 (Acts 1879-80), authorized this company to so construct its works upon the land of the plaintiff. That act should receive a reasonable construction, and be so construed, if possible, as to avoid repugnance to the constitution; and while by that act, these companies are authorized to construct their lines and fixtures along the country roads, provided the ordinary use of the road was not obstructed, it is not expressly provided that this may be done without compensation. But the

provision is so as not to obstruct the ordinary use. The commonwealth had and has in these roads nothing but the use to pass over and along, and the act provides that this use shall not be obstructed by virtue of that act. But at the conclusion of this paragraph, constituting the last words in it, are these words, "upon making just compensation therefor;" and then follow the provisions of the law which provide for the proceedings necessary to ascertain what is just compensation by condemnation proceedings. This was certainly the provision of the act as to lands of persons generally; and, if the lands upon which the highway runs is the private property of the citizen, which it clearly is, should not this language be held to apply to such land as well as to others? Why not? The commonwealth has no more power to grant the one than the other. To grant either is to take private property, and this can only be done upon just compensation. If this is the true construction of this act, the same is in accordance with the constitution of the state; and the plaintiff was entitled to maintain his suit against a corporation which neither took lawfully, nor paid just compensation. But if the act does provide for the taking of this private property without compensation, then it is void for repugnancy to the constitution of the state, and the plaintiff was entitled to recover; and the instruction of the court was right.

However, it is claimed by the plaintiff in error that, granting that the rights of the plaintiff are what we have stated, and the commonwealth has only the right to use by going over, still his case is good, because his works are only a use of the easement, and constitute no new taking—no additional servitude. We will now briefly consider this argument.

The right in the commonwealth is to use by going along over. This is the extent of the right. If the right was granted to the defendant to go over simply to carry its messages, then the right granted was in existence before the grant, and the right to go over is not only not disputed, but distinctly admitted. This is the servitude over the land fixed upon it by law, and the whole extent of it. If any thing more is taken, it is an additional servitude, and is a taking of the property, within the meaning of the constitution. To take the whole subject, the land in fee, is a taking. This, however, is the meaning of the term only

in a limited sense, and in the narrowest sense of the word. The constitutional provision which declares that property shall not be taken for public use without just compensation was intended to establish this principle beyond legislative control, and it is not necessary that property should be absolutely taken, in the sense of completely taking, to bring a case within the protection of the constitution. As was said by a learned justice of the supreme court of the United States: "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction—without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws and practices of our ancestors." Justice Miller in *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

It is obvious, and it is so held in many cases, that the construction of a railroad upon a highway is an additional servitude upon the land, for which the owner is entitled to additional compensation. *Cooley Const. Lim.* 548; *Ford v. Railroad Co.*, 14 Wis. 616; *Pomeroy v. Railroad Co.*, 16 Wis. 640. And the power of a legislature to authorize a railroad to be constructed on a common highway is denied upon the ground that the original appropriation permitted the taking for the purposes of a common highway, and no other. The principle is the same when the land is taken for any other purpose distinct from the original purpose, and the reasoning in the two cases is applicable to each. In the case of *Imlay v. Railroad Co.*, 26 Conn. 255, it is said: "When land is con-

demned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby convertible into a common. As the property is not taken, but the use only, the right of the public is limited to the use—the specific use—for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion.” *Nicholson v. Railroad Co.*, 22 Conn. 85; *Railroad Co. v. Steiner*, 44 Ga. 546. In the case of a telephone company, the chancellor, in the case of *Broome v. Telephone Co.*, 7 Atl. Rep’r, 851, held that, in order to justify a telephone company in setting up poles in the highway, it must show that it has acquired the right to do so, either by contract or condemnation, from the owner of the soil, saying: “The complainant seeks relief against an invasion of his proprietary right to his land. The defendants, a telephone company, without any leave or license from, or consent by, him, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation, or any steps to that end, set up their poles upon his land. * * *

“What has been said is sufficient of itself to establish the right of the complainant to relief; for, in order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or condemnation, from the owner of the soil.” As to these rights of the owner of the soil, see 9 Am. & Eng. Cyclop. Law, tit. “Highways,” VII, § 2; *Telegraph Co. v. Barnett*, 107 Ill. 508; *South Western R. Co. v. Southern & A. Tel. Co.*, 46 Ga. 43; *Telegraph Co. v. Rich*, 19 Kans. 517; *Willis v. Telegraph Co.*, 34 N. W. Rep’r, 337.

That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle, in the light of the Virginia cases cited above. If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil, is to dig up his soil; to cut down the trees, is to cut down his trees; to destroy the fences, is to destroy his fences; to erect any structure, to affix any

pole, or put in and upon the land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the commonwealth took this without just compensation, it would be a violation of the constitution. The commonwealth cannot constitutionally grant it to another.

It is true that the use of the telegraph company is a public use. That company is a public corporation, as to which the public has rights which the law will enforce. But these public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally. It is for the private profit of the corporation. It is its business enterprise, engaged in for gain. Its services can only be obtained upon their being paid for. There is no reason, either in law or in common justice, why it should not pay for what it needs in the prosecution of its business. Upon this burden being placed upon it, it can complain of no hardship. It is the common lot of all. If the said company has use for the private property of a citizen of this commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to the plaintiff, and, in the aggregate, a great matter to the plaintiff in error. This argument is not worth considering. It cuts at the very root of the rights of property. It would apply with equal force to all the transactions of life. It is sufficient to say the ægis of the constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation.

We think the instructions of the circuit court were clearly right, and there is no error therein.

There is no error in the process in the case. It was made as provided by law against a non-resident corporation having no officer or agent resident in the county.

There was no error in the refusal of the court to remove the case from New Kent county. Not the slightest ground is shown for it. And it may be remarked that the plaintiff in error selected its forum when it thus unlawfully invaded the property rights of one of the citizens of that county.

As to the contention concerning the summoning of the jury by the sheriff, because he was interested in the suit, there is no error in that action of the court below: (1) Because the sheriff does not appear to be in any wise interested in the suit; and (2) because the

sheriff did not in fact select the jury. Upon objection made, the judge made out the list, and gave it to the deputy sheriff, to summon the required *venire*.

Upon the whole case, we are of opinion that there is no error in the judgment appealed from, and the same must be affirmed.

Fauntleroy and Hinton, JJ., concurring. Lewis and Richardson, JJ., dissent.

Electric poles and wires in streets—rights of abutting owner.—The public cannot use, or authorize the use, of the public streets for any purpose inconsistent with their use as a highway, without compensation to abutting owners for injury to their proprietary rights. *Lewis Em. Dom.*, §§ 100, 114, 115, 122; *McQuaid v. Portland, etc., R. Co.*, 1 *Am. R. R. & Corp. Rep.* 84, and note, p. 47. No distinction in principle can be made between a telegraph or telephone line and a steam railroad. The telegraph and telephone form no part of the equipment of a highway, but are entirely foreign to its use. When the fee of the street is in the abutting owner, it follows that he is clearly entitled to compensation for the additional burden placed upon his land. *Board of Trade Tel. Co. v. Barnett*, 107 *Ill.* 507; *Dusenbury v. Mutual Union Tel. Co.*, 11 *Abb. New Cases* 440; *Metropolitan Tel. & T. Co. v. Caldwell Lead Co.*, 50 *N. Y. Supr. Ct.* 488; *Tiffany v. U. S. Illuminating Co.*, 51 *N. Y. Supr. Ct.* 280; *S. C.*, 67 *How. Pr.* 78; *Broome v. New York & New Jersey Tel. Co.*, 42 *N. J. Eq.* 141. The contrary is held in *Pierce v. Drew*, 186 *Mass.* 75, and *Julia Building Ass. v. Bell Telephone Co.*, 88 *Mo.* 258. In the former case two judges dissent, and the opinion of the court and the dissenting opinion will be found to present a very full and able discussion of both sides of the question.

Our position is further sustained by the authorities which hold that a telegraph line on a railroad right of way is an additional burden on the fee for which the abutting owner is entitled to compensation. *American Tel. & T. Co. v. Smith*, 1 *Am. R. R. & Corp. Rep.* 73; *Western Union Tel. Co. v. Rich*, 19 *Kans.* 517; *Atlantic & Pac. Tel. Co. v. C. & R. I. R. Co.*, 6 *Biss.* 158.

If the fee of the street is in the public, the abutting owner may recover for any interference with his rights in the street. The principle of the elevated railroad cases would apply. *Story v. New York El. R. Co.*, 90 *N. Y.* 123; *Lahr v. Metropolitan El. R. Co.*, 104 *N. Y.* 268; *Lewis Em. Dom.*, §§ 122-123. The only rights to be interfered with are those of light, air and access. If there is no interference with these rights, there is no taking and no right to damages. *Gay v. Mutual Union Tel. Co.*, 12 *Mo. App.* 485; *Forsyth v. Baltimore & Ohio Tel. Co.*, 12 *Mo. App.* 494; *Roake v. Am. Tel. Co.*, 41 *N. J. Eq.* 35.

A municipal corporation cannot grant the right to place electric poles and wires in a street unless authorized to do so by statute. *Telegraph Co. v. Newark*, 49 *N. J. L.* 844.

In *Taggart v. Newport Street R. Co.*, ante, p. , it was held that poles and wires for an electric railway might be placed in a street without compensation to the abutting owners.

DONNELLY V. CITY OF BROOKLYN.

(24 N. E. R. 17; 121 N. Y. 9.)

1. LIMITATIONS. SUIT ON AWARD FOR PROPERTY TAKEN FOR WIDENING A STREET. Under the statutes applicable to the city of Brooklyn, an award of damages for property taken for public use may be reduced by an assessment of benefits upon the residue of the property from which the part was taken, and the payment of the award is postponed until the city has had an opportunity to make the assessment. In an action on an award, where the city had failed for several years to have an assessment of benefits made, it was held that the action was not founded upon negligence, but was an action on a judgment within the meaning of the statute of limitations.

2. INTEREST. In such an action where the plaintiff has had possession of the property, interest will only be allowed from the date of the demand for payment.

J. M. & A. H. Van Cott (*Joshua M. Van Cott*, of counsel) for plaintiff. *Almet F. Jenks* for defendant.

RUGER, C. J. The defendant appeals from a judgment which affirmed, with a modification in regard to interest, a judgment of the trial court awarding to plaintiff the damages appraised for the appropriation by the defendant, under the right of eminent domain, of his real estate in Brooklyn for the purpose of widening North Second street. The sole point made upon the defendant's appeal is the bar of the statute of limitations. Its claim is that the *gravamen* of the complaint is for damages occasioned by the negligence of the defendant's assessors in omitting to make an assessment upon the plaintiff's property, for the benefits derived from the improvement referred to, and, therefore, the action being based upon such negligence, that the limitation of six years applies, and bars the action. The plaintiff also appeals from the judgment, and claims that so much of the decision of the general term as reverses the allowance of interest made by the special term, and restricts his right to recover therefor to the time following the presentation of his claim and a demand for its payment, is erroneous. His contention is that the action is founded upon a judgment which, although capable of being reduced by an assessment for benefits, still becomes a liquidated demand, payable absolutely upon the neglect of the assessors to make an assessment within a reasonable time, and thereby effect a reduction of the

award, and that interest runs from the time such reduced award becomes payable. It is claimed by the plaintiff that all of the questions involved in the case, except that of interest, have been settled in his favor by the decision of this court in *McCormack v. City of Brooklyn*, 108 N. Y. 49; 14 N. E. Rep'r, 808; and it is quite clear that, so far as the material questions are concerned, the claim is well founded. A reference to that decision, as well as to some others, recently considered in this court, affecting the liabilities of the city of Brooklyn under statutes authorizing the taking of private property for street purposes, will serve to narrow the range of discussion, and determine the extent to which the principle of *stare decisis* should be applied in this case. The following among other propositions may be considered to have been established by the cases referred to:

(1) That the effect of chapter 559, Laws of 1871, "to widen and improve North Second street," in the city of Brooklyn, as well as other similar acts, is *ex proprio vigore* to condemn the land therein described for the purposes of the improvement provided for, and to authorize the city to appropriate such land to such purposes, subject to the obligation on its part of making compensation therefor as provided by the act. *McCormack v. City of Brooklyn*, 108 N. Y. 49; 14 N. Y. Rep'r, 808; *Sage v. Same*, 89 N. Y. 189; *Genet v. Same*, 99 N. Y. 300; 1 N. E. Rep'r, 777.

(2) That authority given in acts appropriating private property for public improvements, which impose the duty of making payment therefor upon a municipal corporation, and which also authorize the reduction of the amount of awards for the value of property taken by the amount of assessment to be made on the residue of the same lots for benefits, is not obnoxious to the constitutional obligation that it permits a taking of private property for public use without compensation. *Genet v. City of Brooklyn*, 99 N. Y. 297; *Livingston v. Mayor, etc.*, 8 Wend. 85.

(3) That the effect of the provision in such acts which authorizes the application of assessments *pro tanto* to the payment of awards is to postpone the time of the payment of such awards until the city has had an opportunity to institute and complete the necessary proceedings to determine and fix the amount of such assessments, and the property, liable therefor, through the regular

agencies provided by its charter for that purpose. *McCormack v. City of Brooklyn*, *supra*.

(4) That the provisions of section 15, title 4, chapter 384, Laws 1854, as amended by chapter 63, Laws 1862, providing that the liability of the city for the payment of awards should not arise until assessments have been made and deducted from awards, and the report of the assessors is confirmed, although incorporated into the act of 1871, could not be so construed as to authorize the city to prolong indefinitely the time for the payment of awards, or enable it to defeat the land-owner's right to the compensation which was guaranteed to him by the constitution. *Sage v. City of Brooklyn*, *supra*; *McCormack v. Same*, *supra*.

(5) That land-owners in whose favor awards have been made under such acts are respectively entitled to maintain actions against the city, upon such awards, for the damages adjudged to them; but in case assessments are made by the city for benefits, the amount of such assessments must be deducted from the amount of the respective awards, and judgments rendered for the balance only, and in cases where no assessments have been made, and the making thereof has been unreasonably delayed, the land-owner is entitled to recover the full amount of his award. *Sage v. City of Brooklyn*, *supra*; *Genet v. Same*, *supra*; *Taylor v. Same*, 108 N. Y. 616; 15 N. E. Rep'r, 73.

The defendant, while, practically, conceding the correctness of the propositions stated, yet contends that the action is based upon negligence, and is barred by the expiration of six years after the city has permitted a reasonable time to elapse for perfecting its assessment, and the period of four months, after the right to proceed had occurred, is claimed to constitute such reasonable time. It is argued, in support of this claim, that the award of damages having been made and confirmed in November, 1876, and a reasonable time having elapsed thereafter for the making of an assessment without action thereon by the city, such award became due and payable more than six years before the commencement of the action, which did not take place until November, 1888. Of course, if the defendant's counsel is mistaken in the claim that the action is based upon negligence, the whole structure of his argument falls to the ground. It is quite obvious that he has misconceived the plaintiff's cause of action, as it, in fact, has no other foundation.

than a claim of damages for the value of his property, which has been taken under lawful authority by the city. It is for the taking of the property, and not for any act of negligence on the part of the city. The scheme of the charter authorized the city to pay awards in a particular manner, if it chooses to do so, and the only consequence of its neglect to make such payment is, as we have decided, to leave the award enforceable for its whole amount. The negligence of the city is important only in respect to the effect it may have in depriving it of a possible defense founded upon the claim that the award was imperfect, and not obligatory upon it to its full extent. Its neglect simply removed an apparent obstacle to the enforcement of the plaintiff's demand.

The learned counsel for the defendant has reviewed at some length the provisions of the statutes of 1871, 1854 and 1862, with a view of showing that no award of damages can be considered made until after the assessors have also made an assessment for benefits and deducted the amount of such assessment from the respective awards, and struck a balance thereon, which balance he contends constitutes the only award contemplated by these statutes. He bases upon this conclusion the argument that the action must, therefore, be founded, not upon an incomplete award, but upon the neglect of the city. This point is not open for discussion, as it was necessarily decided in the McCormack Case that an award for damages was binding upon the city under the statute referred to, although no assessment was ever made or attempted. The complaint in that action was exclusively upon the award, and the reference therein to the negligence of the city was for the sole purpose of obviating a possible defense. The cases referred to by the counsel for the city to support his contention are authorities against him, since in each one recoveries were had upon awards similar to that involved in this case, and such recoveries were, respectively, on appeal, sustained in this court. *Sage v. City of Brooklyn*, 89 N. Y. 189; *Genet v. Same*, 99 N. Y. 300; 1 N. E. Rep'r, 777; *Taylor v. Same*, 108 N. Y. 616; 15 N. E. Rep'r, 73.

The contention that those actions were not founded upon awards, because the assessments therein were deducted from the awards, and judgment given for the balance only, does not merit serious discussion. The case of *Reilly v. City of Albany*, 112 N.

Y. 42; 19 N. E. Rep'r, 508, cited by defendant, does not help him. That action was brought to recover the contract-price agreed to be paid by the city of Albany to the plaintiff for labor and materials furnished for paving a street. The city was authorized by its charter to raise funds for the payment of this liability by assessment upon the property benefited. Having refused, after performance of the contract, to levy such assessment or pay the contract-price, it was held that its refusal constituted a waiver of the right to delay payment until the particular fund was raised, and it was, therefore, liable to pay the contract-price. The present action is described in the complaint as based upon an award, which is alleged to have become a judgment between the parties as to the amount of plaintiff's claim against the city, by its confirmation in the supreme court. We do not think its character, as a final adjudication upon the question of damages, is affected by the fact that its immediate enforcement is, for a time suspended by the law under which it was made, or by the privilege given to the city, at its option, to make payment in a particular way, if it manifests its intention to avail itself of that privilege within a limited period. That such an award is a judgment, within the spirit and meaning of that term, as used in the statute of limitations, seems to be supported by numerous cases in this, as well as other, states. Thus Mr. Justice Beardsley speaking of the reports of commissioners of estimate and assessment appointed by the supreme court in street opening cases, in *Striker v. Kelly*, 7 Hill, 9, says: "These commissioners are but aids of the court, whose judgment is, at last, to settle the rights and fix the liabilities of the parties. The commissioners are to ascertain the value of the land which may be taken for or affected by the improvement to be made, and determine the amount of damage and benefit which will arise from it. This is to be reported to the court with all needful explanations, and any person conceiving himself aggrieved may appear and urge his objections to what has been done. If the court is dissatisfied with the report, it may be sent back for revision again and again, until the court shall be satisfied that it is according to the justice of the case, when judgment of confirmation is to be given. Thus the report becomes, in effect, the act of the tribunal by which it is confirmed, and the judgment rendered is declared to be an

effective lien upon the lands adjudged to be benefited." The decision in this case was affirmed in the court of errors. 2 Denio, 323. Mr. Justice Jewett, delivering the opinion in *Embury v. Conner*, 3 N. Y. 523, says "that the supreme court, under the provisions of the New Yoak street law, exercises its powers as a court, and not as commissioners appointed by the legislature, and that its decisions in such matters are judgments of that court." In *Dolan v. Mayor, etc.*, 62 N. Y. 475, Judge Rapallo says "that proceedings for such assessments are conducted before the court, and its confirmation of the report of the commissioners is a judgment pronounced on a full hearing of the parties, and conclusive in its character, as to all questions litigated, or which might have been litigated, in the proceeding." In *re Parks*, 73 N. Y. 565, it was said by Judge Earl that "the award, after confirmation, becomes in the nature of a judgment, which cannot be assailed collaterally. It is as final and conclusive upon all parties as a judgment." See *Mayer v. Mayor, etc.*, 101 N. Y. 288; 4 N. E. Rep'r, 336. In *Mayor, etc., v. Colgate*, 12 N. Y. 148, it was said: "The assessment and its confirmation were judicial acts," and "it will work no injustice * * * to apply the limitation prescribed by the law to judgments, to this lien also." In *Fisher v. Mayor, etc.*, 67 N. Y. 73, an action to recover an award, in which an assessment was set up as an offset, Judge Andrews, writing the opinion, says, in substance, that the case of *Mayor, etc., v. Colgate*, is a decisive adjudication of the question, of the period of limitation to be applied to assessments in the city of New York, and concludes that twenty years are necessary to bar an action therefor, whether under the statute it be considered as a judgment or a mortgage. It was held in *Kohl v. U. S.*, 91 U. S. 367, that the liability of a municipal corporation to pay for property taken under the right of eminent domain, for public use, was a common-law liability, and that proceedings taken to enforce such liability were suits at common law. Numerous other cases are cited by the learned counsel for the plaintiff upon this point; but we deem it unnecessary to make further extracts from them, as the question must be regarded as settled by the decisions referred to. We conclude, therefore, that the action is not based upon negligence, and is founded upon a "judgment," within the meaning of that term as used in the statute of

limitations, which requires the lapse of twenty years to constitute a defense. The appeal of the defendant cannot, therefore, prevail.

The question in relation to interest upon the award, raised by the plaintiff's appeal, is a more serious one, and is not entirely free from doubt. The case is *sui generis*, and must be determined from a consideration of its peculiar character and circumstances. We entirely agree with the general proposition stated by him, that, "when interest is stipulated by contract, it is recovered (as interest or damages) according to the contract. When interest is not stipulated by contract, but default is made to pay a liquidated debt when due, interest is recoverable as damages from the date of default." Under this rule, the question arises, when did the duty to pay this award become imperative? Although we have held that the award is a judgment, and enforceable as such, yet the time and mode of enforcement is regulated by the statutes relating to the subject, in force in the city of Brooklyn, which make the award a tentative proceeding, to be controlled, as to its collection, by subsequent events. As stated by the learned counsel for the plaintiff in his brief, the provisions of the statutes (2 R. S., § 9, page 364, and § 1211, Code Civil Proc.), fixing the time for the running of interest upon judgments are simply declarations of the rule at common law that damages are recoverable as an indemnity for the non-payment of liquidated pecuniary demands at maturity, when they should have been paid. It was held in *Sanders v. Railroad Co.*, 94 N. Y. 642, that interest was recoverable upon such judgments, "not by virtue of any contract to pay interest, but simply as damages, because the defendant was in default in the discharge of its obligation to the plaintiff, and wrongfully withheld money due him." The same rule, in the same language, was laid down in *O'Brien v. Young*, 95 N. Y. 428.

It is obvious that, if the duty to pay has not become absolute, the liability for interest does not arise, either at common law or by section 1211 of the Code. The fact that the taking of the plaintiff's property in this case was constructive only, and that he has never been actually disturbed in its use or possession, must, under the circumstances of the case, be considered to have an important bearing upon the subject. The only step on the part of

the city looking toward the reduction of the property to possession seems to be the proceeding taken in 1876, to appraise the plaintiff's damages, and procure confirmation of the award. Its continued inaction for twelve years thereafter afforded strong evidence that it was unwilling to go on with the contemplated improvement, and, from all that appears, the plaintiff acquiesced in the delay of the city. He had the right, at all times after the making of the award, to proceed by *mandamus* to compel the city to complete an assessment for benefits, and, after the lapse of a reasonable time for it to do so, to sue it for the damages sustained in the taking of his property. He did neither of these things until the commencement of this action, and seemed, until then, to be willing that the city should abandon its contemplated improvement, if it desired to do so. Undoubtedly the parties interested could by mutual consent discontinue the prosecution of the improvement, and there is much in the case to authorize the inference that this was contemplated by them. At all events, it is conceded on all hands that the time for the payment of the award was not definitely fixed by the charter, and that its amount could be unsettled and reduced by the subsequent action of the city in making assessments.

The scheme of the Brooklyn charter contemplates the reduction of awards by assessments, and the lapse of sufficient time to make them after confirmation, before liability to pay the awards becomes imperative. The time for such payment, under the law, seems to be extended so long as the right to make assessments remains, and it must, therefore, vary with each particular case. Obstacles and delays may occur in one case that do not arise in another, and the duty to pay must depend upon the circumstances of the case. It cannot be said, under such circumstances, that the sum for which the city is liable is so fixed and certain, or the time of payment so definite, that a period can, before demand, be accurately determined, from which interest shall commence to run. This period is capable of being fixed by the land-owner, either through *mandamus* proceedings, by an action, or a formal demand for the payment of damages, and he has no just reason to complain of any result which has been produced by his own laches. It is conceded by the plaintiff that the legislature could lawfully postpone the payment of awards by providing an equivalent for the pay-

ment of interest, and it was held by this court in *Hamersley v. Mayor, etc.*, 56 N. Y. 533, that so long as the statute left the owner in the possession and use of his property it might be deemed a substitute for the payment of interest on an award, and a practical compliance with the constitutional requirement of compensation for property taken. It was there said by Judge Andrews: "It would require very clear evidence of legislative intent to warrant such a construction of the statute as would give the owner both the use of his land and interest upon the purchase-money." In the case in hand no provision is made by the charter for the payment of interest; but, as we have seen, very definite provisions are made for the postponement of the payment of the award. Within the principle laid down in the cases cited, it would seem to be lawful for the legislature to postpone the payment of awards and of interest thereon until the city has taken actual possession of the property condemned, if the owner was permitted to reclaim his property, and we do not see why the omission to provide for the payment of interest, and the provisions to secure a definite postponement of the payment of the award, are not a substantial equivalent for the suspension of a right to draw interest, at least while the owner retains the use and possession of his land, and omits any steps to fix the liability of the city.

The judgment of the general term should be affirmed, without costs to either party in this appeal.

All concur.

1. *Eminent domain—action on the award or judgment.*—It has been repeatedly held that the award or judgment for the just compensation for property taken for public use may be enforced by the appropriate common-law action. *Fuller v. French*, 10 Met. 359; *Russell Mills v. County Comm'rs*, 16 Gray, 347; *Ganson v. Buffalo*, 1 Keyes, 454; *Sage v. Brooklyn*, 89 N. Y. 189; *Fisher v. Warwick R. Co.*, 13 R. I. 287; *Aken v. Parfrey*, 35 Wis. 249; *Corwith v. Hyde Park*, 14 Ill. App. 635; *Chicago v. Wheeler*, 25 Ill. 478; *Blanchard v. Maysville, etc., Turnpike Co.*, 1 Dana, 86; *Bigelow v. Cambridge, etc., Turnpike Co.*, 7 Mass. 202; *Jeffrey v. Blue Hill Turnpike Co.*, 10 Mass. 368; *Gay v. Wells*, 7 Pick. 217; *Kimball v. Rockland*, 71 Me. 187; *Lebanon v. Olcott*, 1 N. H. 339; *Robbins v. Bridgewater*, 6 N. H. 524; *Smart v. Portsmouth & Concord R. Co.*, 20 N. H. 233; *Akers v. Philadelphia*, 4 Phila. 56; *Hallock v. Woolsey*, 23 Wend. 328; *Battles v. Braintree*, 14 Vt. 348; *La Crosse, etc., R. Co. v. Seeger*, 4 Wis. 268.

2. *Interest on the award or judgment.*—The subject of interest generally in condemnation proceedings is discussed at length in *Lewis Em. Dom.*, § 499. As

to whether the award or judgment for compensation bears interest, there is great diversity in the adjudged cases. Some hold that the award or judgment bears interest from the date of confirmation or entry like an ordinary judgment. *Cooke v. South Park Comm'rs*, 61 Ill. 115; *Morris v. Baltimore*, 44 Md. 598; *Mississippi Bridge Co. v. Ring*, 58 Mo. 491; *Pennsylvania R. Co. v. Cooper*, 58 Penn. St. 408; *Haley v. Philadelphia*, 68 Penn. St. 45; *Miskey v. Philadelphia*, 68 Penn. St. 48; *Philadelphia v. Miskey*, 68 Penn. St. 49; *Morris v. Philadelphia*, 70 Penn. St. 333; *Davis v. North. Pennsylvania R. Co.*, 2 Phila. 146; *Millick v. Philadelphia*, 11 Phila. 354.

Others hold that interest should only be computed from the date of possession by the party condemning. *Illinois & St. Louis R. Co. v. McClintock*, 68 Ill. 296; *South Park Comm'rs v. Dunlevy*, 91 Ill. 49; *Beveridge v. West Park Comm'rs*, 7 Ill. App. 460; *Fiske v. Chesterfield*, 14 N. H. 240; *Hamersley v. New York*, 67 Barb. 35; *S. C.*, 56 N. Y. 533; *Stewart v. County*, 2 Penn. St. 340; *Second Street, Harrisburg*, 66 Penn. St. 132. Or from the time when the owner can enforce payment. *Phillip v. Pease*, 39 Cal. 582; *Chicago v. Wheeler*, 25 Ill. 478; *Dyer v. Philadelphia*, 4 Phila. 328; *Fink v. Newark*, 40 N. J. L. 11. Or from the time of demand. *Beveridge v. South Park Comm'rs*, 100 Ill. 75; *Barnes v. New York*, 27 Hun, 236.

The true principle would seem to be that the owner should have interest on the award or judgment from the date of its confirmation or entry, less the value of the use of the property for such time as he has had the use. Possession is not necessarily the equivalent of interest. The owner cannot sell or rent the property, or put it to any use, except subject to the right of another to take the property at a valuation already fixed. This position of the owner is not through his fault, and he should not suffer in consequence of it. *Warren v. First Division St. Paul*, etc., R. Co., 21 Minn. 424, 437.

CASE V. INSURANCE COMPANY.

(33 Pac. R. 534; 83 Cal. 473.)

1. **INSURANCE LIMITATION IN POLICY.** A policy provided that no suit should be sustained thereon unless commenced within twelve months after the occurrence of the fire. By another provision proofs of loss were to be made, and the loss was made payable "sixty days after the full completion by the assured of all the requirements herein contained." Held, that the twelve months did not begin to run until the expiration of the sixty days specified.

Rhodes & Barstow for appellant. *Haggin, Van Ness & Dible* for respondent.

SHARPSTEIN, J. The policy upon which this action is based contains, among others, the following clause: "It is mutually agreed that no suit or action for the recovery of any claim by

virtue of this policy shall be sustainable in any court of law or chancery until appraisement shall be had, if demanded by this company, and in accordance with the printed conditions of this policy, nor unless such suit or action shall be commenced within twelve months next after the fire shall occur." The fire is alleged to have occurred on the 12th day of September, 1884; and this action was commenced on the 22d day of November, 1885, more than twelve months next after the fire occurred.

The contention of appellant is that at the time of the commencement of the action it was barred by the terms of said stipulation. That contention must prevail unless the clause upon which it is based is modified by some other clause or clauses of the policy. One clause reads as follows: "The amount of loss or damage to be estimated according to the actual, cash, marketable value of the property at the time of the loss, which in no case shall exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation of such property by reason of age, wear and tear, location, change of style, lack of adaptation to profitable use, or other causes. The adjusted claim under this policy shall be due and payable at the company's office in San Francisco, Cal., sixty days after the full completion by the assured of all the requirements herein contained." Among the requirements therein contained were the following: "The assured, his, her and their agents and servants, shall, whenever required, submit to an examination or examinations, under oath, by any person, appointed by this company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of this company in San Francisco as often as required, and permit extracts and copies thereof to be made. The assured also shall produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the said property, damaged or not damaged, for examination, to any person or persons named by this company, and shall also furnish such further particulars, and such certificates of a magistrate or officer charged with the duty of investigating fires, as may be required. The proofs of loss shall be made by the party insured in regular form." It is alleged and proven that appellant exacted a compliance by the assured with all of these

requirements, and that the insured complied therewith as rapidly as he was able to, and that he was unable to fully comply therewith before the 16th day of October, 1885 — more than thirteen months after the fire occurred, and more than one month after the expiration of the time within which an action could be commenced, according to the construction which the appellant's counsel insist should be given to the policy. The adjusted claim under the policy was payable sixty days after the full completion of the assured of all the requirements contained in the policy. No right of action accrued until more than three months after it was barred by the twelve months' limitation clause, unless that clause is modified by some other clause.

In *Spare v. Insurance Co.*, 9 Sawy. 142; 17 Fed. Rep'r, 568, the court, Deady, J., said: "On the authority of adjudged cases (*Davidson v. Insurance Co.*, 4 Sawy. 594; *Riddlesbarger v. Insurance Co.*, 7 Wall. 389; *May Ins.*, § 478), it is admitted by counsel for the plaintiff that this clause in the policy limiting the time within which a suit may be commenced thereon against the defendant is valid, but they contend that it must be read in connection with that other clause which provides that a loss does not become payable until sixty days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that, the right to sue on the policy being postponed until the loss is payable, namely, sixty days after proof thereof, the twelve-months' limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority, and, in my judgment, is correct on principle." *Mayor, etc., v. Insurance Co.*, 39 N. Y. 45; *Hay v. Insurance Co.*, 77 N. Y. 241; *Barber v. Insurance Co.*, 16 W. Va. 658; *Chandler v. Insurance Co.*, 21 Minn. 85; *Steen v. Insurance Co.*, 89 N. Y. 315; *Killips v. Insurance Co.*, 28 Wis. 472; *May Ins.*, § 479. "In *Steen v. Insurance Co.*, supra, the policy contained two similar conditions; and the court, in construing them, said: 'We think the intention of the defendant was to give the insured a full period of twelve months, within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the

parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger; not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things, and a fixed lapse of time thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in a condition to bring an action. Under any other construction the two conditions are inconsistent with each other.'” This case is distinguishable from *Garido v. Insurance Co.*, 8 Pac. Rep'r, 512, in which the plaintiff had ample time after his right of action accrued to have commenced it within twelve months after the loss occurred. In this case it was more than twelve months after the fire before an action could be commenced. We must concede, however, that *Garido v. Insurance Co.*, supra, is not altogether in harmony with the cases which we follow in this case. Under the construction which we give to the policy, we think the complaint states a cause of action not barred by the provisions of the policy; and the evidence is sufficient to justify the verdict of the jury.

Judgment and order affirmed.

We concur: McFarland, Thornton, JJ.

LIBBEY V. TOBEY.

(19 Atl. R. 904; 82 Me. 397.)

1. CORPORATIONS. SUIT BY CREDITOR AGAINST STOCKHOLDER TO RECOVER AMOUNT UNPAID ON STOCK. REQUISITES OF SUIT. When a judgment creditor of a corporation seeks to recover the amount of such judgment, or any part thereof, from a stockholder who has not fully paid for his stock, he must bring his case within the provisions of R. S., chapter 46, sections 46, 47, by showing: (1) A lawful and *bona fide* judgment recovered within two years next prior to his action against the stockholder. (2) That the defendant subscribed for, or agreed to take, stock in the corporation, and has not paid for the same as defined in section 45. (3) That his original cause of action was contracted during the defendant's ownership of such unpaid stock. (4) That the proceedings to obtain such judgment against the corporation were commenced during

the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the corporation books.

2. WHAT WILL DISCHARGE LIABILITY OF STOCKHOLDER. To relieve a stockholder from liability for stock subscribed or agreed to be taken, payment therefor must be made *bona fide* in cash, or in some other matter or thing *bona fide* and fair valuation thereof.

3. EFFECT OF PAYMENT FOR STOCK IN PROPERTY. Payment of stock in any thing except money will not be regarded as payment except to the extent of the true value of the property received in lieu of money.

4. STOCKHOLDER'S LIABILITY IS STATUTORY AND WILL BE STRICTLY CONSTRUED. The individual liability of a stockholder for the debt of the corporation depends entirely upon express provisions of statute law. There being no contract, express or implied, between him and the plaintiff, the statute is to be construed strictly.

5. The remedy now provided by statute exists only against those "who have subscribed for or agreed to take stock in said corporation, and have not paid for the same," etc.

6. The statute contemplates a transaction or contract with the corporation in accepting, subscribing for, or agreeing to take stock, and not one between individuals in the purchase of stock in open market.

7. A PURCHASER OF STOCK WITH NOTICE IS LIABLE FOR UNPAID INSTALLMENTS. A purchaser of stock assessable upon its face, or by the charter or by-laws of the corporation, and payable by installments, is liable for the amount remaining unpaid as if an original subscriber, and chargeable with notice of any such unpaid balances, whether purchased of the corporation or in open market.

8. LIABILITY OF PURCHASER OF STOCK ISSUED AS FULLY PAID FOR PROPERTY OVERVALUED. The defendant, having transferred all the stock subscribed for by him, except four hundred shares, prior to the date when the plaintiff's original cause of action against the corporation was contracted, is liable in this action only for the balance remaining unpaid upon those four hundred shares, and not upon the additional one thousand shares which he purchased in open market, and which were issued by the corporation as fully-paid stock.

THIS was an action on the case under sections 46 and 47, R. S. (1883), chapter 46, to recover from the defendant the amount of a judgment obtained by him against the Deer Isle Silver Mining Company, a corporation existing under the laws of the state of Maine, and in which the defendant was a subscriber and owner of stock not fully paid. The statute, so far as material to an understanding of the case, provided that any person having a judgment against the corporation might commence an action on the case or bill in equity against any persons who have subscribed for or agreed to take stock in said corporation and have not paid for the same. No stockholder was to be liable for debts not con-

tracted during his ownership of such unpaid stock, nor unless proceedings to obtain judgment against the corporation were commenced during such ownership, or within one year after its transfer by such stockholder had been recorded on the corporation books.

The case was reported to the full court to render such judgment upon the competent and admissible testimony as the legal rights of the parties required.

Spaulding & Buker and Holmes & Payson for plaintiff. *W. L. Putnam and G. C. Wing* for defendant.

FOSTER, J. This case comes before the court on report. The plaintiff, having recovered judgment against the Deer Isle Silver Mining Company for \$5,634.69 debt and \$116.10 costs of suit, claims the right to enforce his judgment against this defendant as a stockholder of the corporation by force of R. S., chapter 46, sections 46, 47.

The liability sought to be enforced is a statutory one, and in order to prevail the plaintiff must bring his case within the statute, by proving that he has a lawful and *bona fide* judgment against the corporation, "based upon a claim in tort or contract, or for any penalty" recovered within two years next prior to this action; that the defendant subscribed for, or agreed to take, stock in the corporation, and has not paid for the same as defined in section 45; that the cause of action upon which his judgment against the corporation was founded was contracted during the defendant's ownership of such unpaid stock; and that the proceedings to obtain this judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the books of the corporation. *Grindle v. Stone*, 78 Me. 176; 3 Atl. Rep'r, 183.

That there was a valid judgment in favor of the plaintiff against the corporation, recovered within two years next prior to the commencement of this action, is not in controversy.

By the certificate of organization, it appears that the corporation was organized in August, 1879, with what purported to be a paid-up capital of \$300,000, divided into shares of the par value

of \$5 each, and that this defendant subscribed for, and agreed to take, two thousand two hundred and fifty shares. An examination of the evidence satisfies us that payment for the stock thus subscribed was not made in cash, or in any matter or thing at a *bona fide* and fair valuation thereof, within the purview of section 45.

It appears that the associates voted to purchase the mineral right on Dunham point, Deer isle, for the sum of \$240,000, and to issue stock to the several owners for their respective shares.

It becomes material to ascertain how this capital was paid up — whether it was a payment in a “matter or thing at a *bona fide* and fair valuation thereof.”

The case shows that twenty persons, of whom the defendant was one, joined together for the purpose of purchasing, opening and developing this mineral right, and paid the owner, for three-fourths of the property, \$5,000 — or at a valuation of \$6,666.67 for the whole. It was this property alone for which the corporation paid \$240,000 in its stock at par.

After the organization of the company the land was put in at \$240,000, and the owners of three-fourths ratably returned twelve thousand shares, amounting to \$60,000, to the corporation as a working capital. Under that arrangement this defendant returned six hundred shares as his proportion, and received a certificate of one thousand six hundred and fifty shares of paid-up stock. The total actual cost to these associates, including \$2,500 expended in improving and developing the property, was not over \$375 each, or a fraction less than twenty-three cents a share for one thousand six hundred and fifty shares each.

That the property was not actually worth the sum of \$240,000 at the time it was purchased is too evident to require discussion. The price paid, as well as the acts of the purchasers, immediately after the organization, in voting to sell the capital stock of the company, to the amount of \$45,000, at fifty cents a share, or at one-tenth its par value; the sale of a considerable portion of the treasury stock, within sixty days of the organization, at that figure; the fact that the whole \$60,000 of treasury stock was sold at prices ranging from fifty cents to one dollar and fifty cents a share; and the very low figure at which many of the stockholders sold their stock — is evidence from which we may well infer that

the value of \$240,000 placed upon this property by the corporation was not a "*bona fide* and fair valuation thereof."

The payment of stock in any thing but money will not be regarded as a payment except to the extent of the true value of the property or thing received in lieu of money. R. S., chap. 46, § 45; Thomp. Liab. Stockh., §§ 127, 201; Boynton v. Hatch, 47 N. Y. 225; Nathan v. Whitlock, 3 Edw. Ch. 215.

The cause of action against the corporation was contracted on the 18th day of November, 1882. On that day the defendant had standing in his name four hundred shares only of the original stock for which he had subscribed, the balance having been transferred by him before that date. He also at that time had one thousand shares purchased in the market, from Richardson, Hill & Company, of Boston, on March 23, 1882.

The defendant claims that, if liable at all, he is liable only upon this four hundred shares of original stock.

This position we think is correct.

The individual liability of members for the debt of a corporation is a departure from the established rules of law, and is founded solely upon grounds of public policy, depending entirely upon express provisions of statute law. The defendant, if chargeable at all, is chargeable upon a statute liability, as having "subscribed for, or agreed to take, stock in said corporation," and who has "not paid for the same." The contract was not made with him, or on his account. There was no contract, express or implied, between him and the plaintiff. Such liability is, "therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute." Gray v. Coffin, 9 Cush. 192; Erickson v. Nesmith, 4 Allen, 233, 235; Knowlton v. Ackley, 8 Cush. 93, 96.

As early as 1836 the legislature of this state saw fit to provide a remedy in favor of creditors of corporations, whereby the stockholders of all corporations were made liable individually for the corporate debts to the amount of their several shares. The history of the numerous and somewhat complicated enactments upon this branch of the law may be found in an opinion by Tenny, C. J., in Milliken v. Whitehouse, 49 Me. 527; and it is unnecessary to enter upon any extended review of the legislation on this subject here. It is sufficient to say that up to 1871 the liability ex-

isting by general statute (R. S. 1871, chap. 46, §§ 24, 26) had been against the "stockholders" to the amount of their stock, in case of deficiency of attachable corporate property. But by the act of 1871 (Laws 1869-71, chap. 205) the statute in relation to the liability of stockholders in corporations was modified, and the word "stockholders," which had existed in previous statutes, was omitted; and the remedy therein provided now exists only against persons "who have subscribed for, or agreed to take, stock in the said corporation, and have not paid for the same," etc.

Referring to this act, Appleton, C. J., in *Poor v. Willoughby*, 64 Me. 379, 383, says: "The language of the act of 1871, chapter 205, is clear and explicit. No room is left for any doubt as to its meaning. It was intended to have effect according to its terms. The past liability of stockholders had been fixed by previous legislation. This act was to fix their liability in future. So far as it modifies, changes, restricts or limits the then existent liability of stockholders, it must be regarded as a repeal of any law which is thus modified, changed, restricted or limited by its provisions."

The defendant, having sold and transferred all the original stock for which he had subscribed, except the four hundred shares, at the time this cause of action was contracted, cannot be held upon the one thousand shares which he had purchased in the market. They were not shares he had "subscribed for, or agreed to take," within the meaning of the statute. *Tunnel Co. v. Sheldon*, 6 Barn. & C. 341; 13 E. C. L. 161. A fair inference to be drawn from the language of the statute is that of a transaction or contract with the corporation in accepting, subscribing for, or agreeing to take stock, and not one between individuals in the purchase of stock in open market. Had the legislature intended to make the remedy as broad as that contended for by the plaintiff, and thus render the defendant liable as a stockholder upon all stock held or owned by him, regardless of the manner in which he may have obtained it, it would have been an easy matter to have so expressed its meaning. Not having done so, it is not the province of the court to extend the remedy beyond the express provisions of positive enactment, especially in cases where the statute is to be construed strictly.

But it is claimed on the part of the plaintiff that, inasmuch as the defendant was a stockholder in the corporation, and knew the

circumstances under which the stock was originally issued by the corporation, he was a purchaser, with notice, and, therefore, liable on the one thousand shares purchased in the market as well as on the four hundred shares of original stock.

We do not think this doctrine can properly be extended to the facts existing in this case. The authorities relied on in support of this proposition will be found to differ essentially from the case at bar, and relate to cases influenced by some peculiar statute provision differing essentially from that of our own state, or to cases where the certificates for stock were assessable upon their face, or by the charter or by-laws of the company, and payable by installments. In such case the stock, either upon its face, or, by the charter or by-laws, being liable to assessments, and transferred while the company is solvent, the transferee is substituted for the original subscriber or holder of the stock as to the rights of the company in demanding and collecting assessments. *Upton v. Trebilcock*, 91 U. S. 45; *Pullman v. Upton*, 96 U. S. 328; *Ang. & A. Corp.*, § 534.

The same was true in *Seymour v. Sturges*, 26 N. Y. 134, where the stock was assessable on its face, or by the by-laws of the corporation; and in *Railroad Co. v. Boorman*, 12 Conn. 530, and *Ward v. Manufacturing Co.*, 16 Conn. 593, the transferee voluntarily assumed the liabilities of the original stock. So in *Mann v. Cooke*, 20 Conn. 178, the defendant dealt directly with the corporation, the action being brought by a receiver upon a subscription, which was special in its terms; and the case turned partially upon the construction and effect of a statute of the state of New York.

Cook Stocks and Stockholders, § 257, lays down no affirmative rule, the discussion there relating to cases where the corporation itself had a right to enforce calls or assessments on the stockholder notwithstanding this did not always appear on the face of the certificates.

In the case at bar the stock was issued by the corporation itself as fully-paid stock, and the corporation had no right of assessment or future calls upon the stockholders; and no right of action existed in favor of the corporation against any stockholder for assessments or calls. *Scovill v. Thayer*, 105 U. S. 143, 153, 154; *Cook Stocks*, § 38. Whatever, therefore, may be the rule of law

governing cases where the stock is assessable on its face, as in *Upton v. Trebilcock*, supra, and where, in such cases, the transferee with notice is personally liable for the unpaid part value of the stock, it has no application to the case before us, where fully-paid stock was issued for property, though the property was put in at an overvaluation. There was no promise to the corporation to pay any deficiency, either express or implied. No obligation could, therefore, be transferred by novation from the original holder of the stock to the transferee.

The defendant, being liable on the four hundred shares, is liable only for so much as remains unpaid thereon. That would be the difference between the par value of \$5 and the amount which the evidence shows he has paid, namely, twenty-three cents per share, amounting to \$1,908.

Judgment for plaintiff for \$1,908, with interest thereon from date of writ.

Peters, C. J., and Walton, Virgin, Libbey and Haskell, JJ., concurred.

LIABILITY OF THE PURCHASERS OF STOCK FICTITIOUSLY ISSUED
AS FULLY PAID.

1. *Bona fide purchasers without notice.*— In *Brant v. Ehlen*, 59 Md. 1; S. C., 9 Am. Corp. Cas. 894, the complainant, who was a judgment creditor of the Virginia Coal and Iron Company, brought a suit in equity to recover from the defendants, as stockholders in the company, the amount of his judgment. The stock in question was issued for land conveyed to the company, but, according to the plaintiff, the company did not receive value for the stock so issued to the extent of more than ten per cent of the face of the stock. The certificates were in the ordinary form of full-paid stock and were purchased by the defendants as full-paid shares with no notice of fraud or irregularity in their issue. The court held that they were not liable. The question is fully discussed in the opinion from which we quote as follows:

"In the view we take of the case, it is unnecessary to consider the many questions so elaborately argued at bar, for the liability of the defendants after all may be said to depend on the following questions: First, whether as *bona fide* transferees of shares of stock issued by the company to the original subscriber as full-paid shares, and sold by them as such, the defendants are liable in an action by a creditor of the company for unpaid installments on said shares, if it should turn out that they were not in fact full-paid shares; secondly, whether the company had the power under its charter to buy coal land for mining purposes and to pay for the same in the stock of the company.

"As to the first, were it a question of first impression, we do not see on what grounds the liability of the defendants as *bona fide* transferees could be maintained. This liability for subscription to the stock of a corporation is

founded on contract. Where one agrees to take a certain number of shares, the law implies a promise to pay for them according to the terms of his subscription. If they are sold before all the installments are paid, and are bought with such knowledge, the law implies a promise on the part of the purchaser to pay whatever may be due thereon according to the terms of the original subscription. In such cases the purchaser stands in the shoes of the original subscriber. These are elementary principles, about which there can be no contention. But where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied on the part of the purchaser without notice, to be answerable either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false. He could be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and if it be said that shares were fraudulently issued he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud. The company beyond all question could not, under such circumstances, maintain action against him, because it would be estopped by its own acts and declarations. But the argument is, that independent of the relation of debtor and creditor between the stockholders and the company growing out of the contract of subscription, there is another relation which the subscriber sustains to the creditors upon the insolvency of the company. That, as to them the unpaid subscription constitutes a trust fund, which it is beyond the reach of any agreement between him and the company to divest or impair.

"In speaking of the assets of an insolvent corporation as constituting a trust fund for the payment of creditors, it is necessary to understand precisely what is meant by the courts.

"No one will pretend for a moment that, in subscribing to the stock of a company, the purpose is to create a trust fund for creditors. On the contrary, the object primarily is to furnish means to carry on its business, and to share the profits earned by the corporation, and so long as it is a going concern it has the right, and indeed it is the duty, to manage and dispose of its assets, including stock subscriptions, for the promotion of its own interest. If it ceases to do business, or if it becomes insolvent, then all assets which it then has or owns, including paid and unpaid subscriptions, either in the hands of the original subscriber, or in the hands of his assignee with notice, become a trust fund for the payment of creditors, and they have a right to follow the property constituting this fund, and subject it to the payment of their debts, unless it has passed into the hands of a *bona fide* purchaser without notice. And, further, if there has been any fraudulent or collusive disposition of the assets of the corporation, all who participated in the fraud may be held liable to the creditors. In *Sanger v. Upton*, where this doctrine of trust funds is as strongly asserted as in any other case, the court say: 'The capital stock of an incorporated company is a fund set apart for the payment of its debts. If diverted the creditors may follow it so far as it may be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice.'

"This is what the courts mean in speaking of the assets of an insolvent corporation constituting a trust fund for the payment of creditors, and, as thus un-

derstood, it furnishes no ground upon which the liability of the defendants, as *bona fide* purchasers of stock issued as full paid, can be maintained, although such stock was not in fact full paid. If this is so, on what other ground is the superior equity of the creditor based? It was said the purchaser ought to ascertain by inquiring whether the stock issued by the company was in fact full paid. It must be admitted, however, that this obligation rests with equal, if not greater force, on the creditor. He deals directly with the company, and has, it is fair to presume, greater means and facilities for ascertaining its real condition and its claim to confidence and credit than the purchaser of stock which is sold on the market; and sold, too, in many instances, at a distance from the company's place of business. * * * Shares of stock are not, strictly speaking, negotiable instruments, but courts speak of them as *quasi* negotiable instruments, and when they are issued as full-paid shares, and as such sold in open market, the purchaser is not bound to suspect fraud where every thing seems fair and conformable to the requirements of the law. Any other doctrine would virtually destroy the transferable nature of such shares and paralyze the whole of the dealings in the stock of corporations."

The same conclusion was reached in the following cases, in all of which stock was issued as fully paid, for which the corporation did not in fact receive full value, and in which the attempt was made to hold transferees of the stock, who had bought in good faith and without notice, for the amount actually unpaid on the stock: *Erskine v. Lowenstein*, 82 Mo. 301, affirming 11 Mo. App. 595; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Johnson v. Lullman*, 15 Mo. App. 55; *Foreman v. Bigelow*, 4 Cliff. 508; *Steady v. Little Rock, etc., R. Co.*, 5 Dill. 848. And see *Phelan v. Hazard*, 5 Dill. 45; *McCracken v. McIntire*, 1 Duv. (Canada) 479; *Lowell Transfer of Stock*, § 186; *Cook Stock and Stockholders*, §§ 50 and 257; *Thompson Liability of Stockholders*, § 135.

The English cases establish the same doctrine. *Waterhouse v. Jamieson*, L. R., 2 Scotch & Div. App. 29; *Barkinshaw v. Nicolls*, L. R., 3 H. L. (Pt. 2) 1004; *Bash's Case*, L. R., 6 Ch. App. 246; *Carling's Case*, L. R., 1 Ch. Div. 124; *Ex parte Currie*, 7 L. T. (N. S.) 486; *Guest v. Worcester, etc., Ry. Co.*, L. R., 4 C. P. 9; *Oakes v. Turquand*, L. R., 2 Eng. & I. App. 325. In *Waterhouse v. Jamieson* stock of the par value of £105 per share was, for a nominal consideration, issued as paid up to the extent of £100 per share. Upon the question whether an innocent purchaser of these shares who relied upon the certificate of the company that £100 had been paid in on each share, and who had paid in the remaining £5 per share, could be made liable to the creditors of the company, the Lord Chancellor says:

"The real and substantial point appears to be this: 'Whether or not a person taking shares in a company established under a deed which recites, however untruly, that £100,000 has been paid, and engaging, by his signature to that deed, to meet all the contributions which remain to be levied, but which are not to exceed £5 a share, the rest having been paid — whether, moreover, a person having purchased shares in the market on which the representation is that £100 has been paid upon each share, and receiving certificates of those shares signed by the directors themselves, who were competent to act in the matter, and who gave such certificates, stating that £100 per share had been paid up, can afterward, at the instance of creditors of the company, who dis-

cover that in truth no such payment has ever been made by the original holders of the shares, but that in reality the shares had been taken and issued to the public without the fact being known that while they were £105 shares, only £5, or some very small amounts, had been paid upon them, whether such a shareholder can be sued on behalf of the creditors of the company for the £100 per share which remains unpaid?

"That question being raised between the creditors and the alleged shareholder, one has to consider what the exact position of such a shareholder is, and especially to consider how far, regard being had to the whole policy of these acts of parliament, a shareholder can set up the defense that he is not liable to the creditors beyond the amount which he has contracted to pay.

"The judges in the court below differed considerably in opinion upon this point. I confess, after some considerable hesitation, I have come to the conclusion that a shareholder is entitled to say: The contract I have entered into must be found in the deed into which I have entered. For all purposes as between me and third persons, I am only to be held to have entered into those engagements which the deed itself represents me to have entered into; and as regards the shares which I have taken and purchased, having a document signed by those who are enabled to give such a certificate, certifying that a certain amount per share has been paid, which certificate is entered and duly registered as the act requires, for the very purpose of protecting the shareholders on the one hand and the creditors on the others, I am entitled to say, no fraud being chargeable against me, that I am only liable on that contract I have entered into. I am only liable to the extent of the money which appears by the certificate itself, given me by the directors of the company, to be unpaid."

2. *Liability of purchasers with notice.*—In all the cases which have been referred to above it is assumed, either expressly or by implication, that a purchaser of stock, which, though purporting to have been fully paid, has not in fact been fully paid, who has notice of the facts in the matter, will be liable to creditors of the corporation to the extent of the amount actually unpaid on the stock. Both Lowell and Cook say that the purchaser would be liable under such circumstances. *Cook Stock, etc.*, § 49; *Lowell Transfer of Stock*, § 186.

In *Foreman v. Bigelow*, 4 Cliff. 546, the court say: "Cases arise, however, where the suit was against the perpetrators of the fraud, or against holders of the stock, with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry, in which the rule is different. Equity, in such a case, regards the property of the corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it in whosoever's possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser."

As respects creditors stock issued for a fictitious payment is only paid for to the extent of the money or value of the property or services actually received in payment. When stock is issued as fully paid for a partial payment in money, or for property or services at a fictitious valuation, the arrangement is held to be, in effect, that the stockholders shall not be called upon to pay more, unless it becomes necessary to pay more in order to satisfy the creditors of the company, and if such necessity arises, then they shall pay such further

sum, not exceeding the balance due on the stock, after crediting the amount actually received thereon, as may be necessary to discharge the debts of the company. *Scovill v. Thayer*, 105 U. S. 143, 154. A purchaser of such stock with notice of the facts, takes it subject to this contingent liability which may be enforced against him upon the same principles as apply to the enforcement of assessments against a transferee made after the transfer. *Cook Stock and Stockholders*, §§ 256, 418, 423.

3. *The questions of bona fides and of notice.*—A certificate of stock which contains a recital or representation on its face that it is fully paid, or any certificate, record or representation made by the proper officers of the corporation to the same effect, will justify a purchaser in believing the stock to be as represented. With any of these evidences before him, he is clearly not bound to inquire further. *Brant v. Ehlen*, 59 Md. 1; S. C., 9 Am. Corp. Cas. 394; *Waterhouse v. Jamieson*, L. R., 2 Scotch & Div. App. 29; *Burkinshaw v. Nicolls*, L. R., 3 H. L. 1004. "The purchaser is not bound to suspect fraud where every thing seems fair and conformable to the requirements of the law." *Brant v. Ehlen*, *supra*.

In Missouri it is held that certificates of stock in the usual form though containing nothing on their face which affirmatively shows that they are fully paid, are to be presumed to be fully paid, and a purchaser taking them without notice to the contrary, is protected from any liability on account of their not in fact being fully paid. *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Johnson v. Lullman*, 15 Mo. App. 55; *Erskine v. Lowenstein*, 11 Mo. App. 595; 82 Mo. App. 301.

The certificates in question in *Brant v. Ehlen*, 59 Md. 1; S. C., 9 Am. Corp. Cas. 394, appears to have been of the same purport. The court say of them: "The certificates are in the ordinary form of full-paid stock, *with nothing on their face to indicate that they were not fully paid.*" The same is true of the certificates in question in *Foreman v. Bigelow*, 4 Cliff. 508, as appears from the remarks of the court in *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 501.

In the case last referred to the court says: "But neither in America nor in England can a shareholder be held liable to a creditor of the corporation unless his liability arises either *ex contractu* or *ex delicto*, either by virtue of contract or of some misconduct or carelessness on his part by which another has been deceived or hurt, so that the stockholder is estopped to say that in truth there was no contract. Unless McCluney, in the present case, was bound to inquire whether these shares were actually paid up, it is impossible to hold him liable. There is no dispute that he acted in good faith, that he believed the stock to be paid up, and that, as between the company and the original stockholder, it really was paid up. We do not know on what principle it is to be said that the person purchasing stock must suspect fraud. But, waiving that, what inquiry was McCluney to institute in this case, and from whom was he to seek information? We do not think he was bound to go beyond the company, and the company claimed that the stock was paid, and the book of the company would have shown him that the stock was fully paid. * * * It is believed that a share of stock in the ordinary form is to be taken to be paid up in the absence of any thing appearing to the contrary, and that it can make no difference whether the certificate says on its face that the stock is fully paid

or says nothing about it. We think that, where the stock is taken in good faith as paid up, in the absence of any thing which should have put the purchaser on his guard, and in a case where the books of the company would have given no notice that the stock was not paid, the purchaser in good faith ought not to be held liable to the creditors of the company.

" * * * And it does seem that any other rule would not only impose upon the stockholder a duty of examination where he has no means of getting accurate information, but, as was urged before the House of Lords in *Burkinshaw v. Nicolls*, 3 App. Cas. (H. L.), 1004, and as is said by Lord Chancellor Cairns, delivering the opinion in that case, would tend to discredit and depreciate all stock and deal a serious blow at the business of manufacturing and mercantile companies." Pages 500, 501.

These latter decisions would tend to put stock certificates in the category of negotiable paper. All the decisions, however, agree in holding that they are not negotiable. *Lowell Transfer of Stock*, § 129; *Cook Stock and Stockholders*, § 412; *Shaw v. Spencer*, 100 Mass. 382; S. C., 1 Am. Corp. Cas. 625; *Sewall v. Boston Water-Power Co.*, 4 Allen. 277; *Sherwood v. Meadow Valley Mining Co.*, 50 Cal. 412; 6 Am. Corp. Cas. 228; *Weaver v. Barden*, 49 N. Y. 286. Such protection as transferees enjoy, whereby they may be placed in a better position than their transferrors, is worked out through the doctrine of estoppel. *Lowell Transfer of Stock*, §§ 129, 180; *Cook Stock*, etc., § 416; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Telegraph Co. v. Davenport*, 97 U. S. 369; S. C., 6 Am. Corp. Cas. 55.

If the corporation represents that the stock is fully paid, either by its certificate or otherwise, and one relying upon such representation, and having no notice to the contrary, purchases the stock for a valuable consideration, there exist all the elements of an estoppel.

Certificates of stock, however, ordinarily contain no representation on the subject. They are simply a certificate that the person named is entitled to a certain number of shares of stock in the corporation. Being non-negotiable a person dealing with them is bound to inquire, and if he does not is chargeable with notice of such facts as inquiry would have revealed. If the records of the corporation show that the stock is fully paid, it will be presumed that inquiry would have disclosed these records, and when such records exist a purchaser without inquiry will be protected to the same extent as though he had purchased with knowledge of the record. *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496, 500.

This view, though not strictly in accordance with the laws of estoppel, appears to be a sound one, and is supported by authority. It is not strictly an estoppel because the purchaser has not relied upon the representations contained in the books of the corporation and been induced thereby to change his position. It is the ground, however, upon which must rest the decisions in *Brant v. Ehlen*, 59 Md. 1; *Erskine v. Lowenstein*, 83 Mo. 301; S. C., 11 Mo. App. 595; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Johnson v. Lullman*, 15 Mo. App. 55; *Foreman v. Bigelow*, 4 Cliff. 508; *Stacy v. Little Rock*, etc., R. Co., 6 Dill. 348.

The same principle is illustrated and applied in *Wilson v. Metropolitan Ry. Co.*, 120 N. Y. 145. The directors of a railroad corporation, without authority,

voted its president, Kneeland, a salary of \$25,000. Subsequently they authorized him to issue and negotiate the notes of the corporation in order to pay the salary. The plaintiff discounted three of these notes under circumstances which imposed upon him the burden of inquiry as to whether their issuance was authorized. The plaintiff made no inquiry. Two of the notes were paid, and the suit was on the third one. The court held that the plaintiff occupied the position of a *bona fide* holder for value, and affirmed a judgment in his favor. The reasoning of the court and authorities relied upon appear from the following extract from the opinion:

"If he had made inquiry of the officers of the corporation, and through them had ascertained that the notes were issued and delivered to Kneeland pursuant to a resolution of the board of directors of defendant, he would clearly be entitled to the protection of a *bona fide* holder without notice. For that resolution recited the existence of an indebtedness to the president for salary, and expressly authorized the issue of notes in the amount thereof 'to be signed by the president and countersigned by the treasurer in the usual way and form.' It furnished information, therefore, that Kneeland was using the notes in the manner expressly authorized. It constituted an appearance of authority upon which a purchaser, for value, could safely rely. True, the resolution recited that the notes were to be issued to pay Kneeland, president, a salary, but it did not pretend to give or fix a salary. It asserted an indebtedness for salary, and one dealing with a railroad corporation which has a right to pay its president a salary, and ordinarily does, is not bound to go behind such an assertion as was made by the defendant's directors, for the purpose of ascertaining whether the salary is legally payable. A different rule would be impracticable and would substantially incapacitate third persons from taking the paper of, or contracting with, corporations.

"The principles enunciated in *F. & M. Bank v. B. & D. Bank*, 16 N. Y. 125; *N. R. Bank v. Aymar*, 8 Hill, 262; *E. Bank v. Monteath*, 26 N. Y. 505, are applicable to the rule we have stated. We are of the opinion, therefore, that if plaintiff had been informed of the resolution, such information, inasmuch as it was true in fact, would afford to him the protection of a *bona fide* holder without notice.

"But the plaintiff did not make inquiry at the time. He assumed that the issue, and proposed disposition, of the notes had been duly authorized. He trusted to the fact of authority, and not to the evidence of it. And can it be said that the resolution which would have protected him, if he had been informed of it, cannot be invoked to aid him now? Does the purchaser of a note, under circumstances which devolve upon him the duty of inquiry, assume a greater risk than the burden of proving that which would have protected him had he diligently inquired, before making the investment? We think not. If the plaintiff had relied upon a statement by one of the officers, that a resolution had been passed, authorizing the issue of the notes, he would have assumed, necessarily, the risk of the statement being true. If true, it would protect him. Otherwise not. He stands in no different position because he did not first inquire. In either event, he would assume only the risk of proving the authorization by resolution.

"This position has support in the reasoning of Judge Andrews in *Cowing v.*

Altman, 71 N. Y. 442, and Williams v. Mitchell, 17 Mass. 101." Caswell v. Putnam et al., 120 N. Y. 145, 153.

This reasoning applies fully to the point under discussion and protects the *bona fide* purchaser of stock represented by certificates in the usual form, whenever the books and records contain that which would have protected him, if he had known and relied upon what they show.

But where there are no records showing the stock to be fully paid, and the certificate is silent on the subject, it must be presumed that an inquiry would have revealed the facts as they are, and a purchaser of stock under such circumstances takes it subject to any liability which may attach to it in favor of the corporation or its creditors. This must necessarily be so according to the well-settled principles which pertain to the transfer of similar property, unless it be held that a corporation, by issuing certificates in the usual form adopted for paid-up stock, and by *knowingly* permitting such certificates to be dealt in, in the belief and on the basis that the stock is fully paid, without taking any steps to undeceive the public, is estopped by its conduct from asserting the contrary, and that this estoppel extends also to the creditors of the corporation. There is no reason upon principle why the creditors of a corporation should not be estopped by the conduct of the corporation which may consist in its silence or inaction when it ought to speak or act as well as by a recital in a stock certificate or an entry in its books. "Where a man has been silent, when, in conscience, he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent." Niven v. Belknap, 2 Johns. 573, 589. "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterward dispute that fact in the action against the person whom he has himself assisted in deceiving." Lord Denman, C. J., in Gregg v. Wells, 10 Ad. & E. 90, 97; 37 E. C. L. R. 71, 75. And see Pickard v. Sears, 6 Ad. & E. 469; S. C., 33 E. C. L. R. 257; Bigelow Estoppel, title "Estoppel by Conduct."

In cases where the certificate of stock or books of the corporation, contain recitals or entries showing that the stock is fully paid, they make a *prima facie* case of good faith in behalf of the purchaser, and the burden will be upon those who assert that he had notice to the contrary to prove it; Burkinshaw v. Nicolls, L. R., 8 H. L. 1004, 1017.

4. **Creditors with notice of the fictitious payment.**—Persons who give credit to the corporation, having full notice or knowledge of the transactions by which its stock has been issued for a fictitious payment, cannot set aside the transaction or compel the stockholders to make any further payment on their stock. First National Bank v. Gustin Minerva Min. Co., 1 Am. R. R. & Corp. Rep. 272; Whitehill v. Jacobs, 1 Am. R. R. & Corp. Rep. 165.

DEPOSIT BANK V. FAYETTE NATIONAL BANK.

SAME V. SECOND NATIONAL BANK.

(13 S. W. R. 339; — Ky. —.)

1. **BANKS AND BANKING. FORGED CHECKS.** It is the duty of a bank to know the signatures of its depositors and when it pays to an innocent holder a forged check, purporting to be drawn on itself by one of its depositors, it cannot recover the money back. Both parties being equally innocent, the bank must suffer the loss.

2. **NEGLIGENCE OF BANK IN NOT DETECTING FORGERY.** In this case the plaintiff continued for nearly five months to pay to the same holders, forged checks of the same tenor, purporting to be drawn by the same person, who was one of its principal depositors, and resided in the same town with the bank. Held sufficient to fix the liability of the bank.

A. Duvall, Breckinridge & Shelby and William Lindsay for appellant. *J. D. Hunt and Beck & Thornton*, for appellees.

PRYOR, J. These two cases involve similar questions, and have, therefore, been considered as one case. The Deposit Bank of Georgetown, the appellant in this court and the plaintiff below, paid a number of forged checks purporting to have been drawn on that bank by one of its depositors, Thomas J. Burgess. The checks were successively presented through a period of four or five months, there being eighteen in number, and were all paid by the Georgetown bank in good faith, and before any discovery of the fraud had been made. All the checks were drawn in the name of Thomas J. Burgess, who was a regular depositor and customer of the bank; the first check having been paid early in December of the year 1883, and the last check paid in April, 1884. The name of Burgess was discovered to be a forgery on the 8th of May, and notice given to the appellees, the two banks to whom these checks were presented and paid, on the 9th of that month. John R. Wolfe, who had committed all these forgeries, had at one time been a clerk in the bank of the appellant, and was in that way familiar with the account and deposits of Burgess. The checks were drawn by Thomas J. Burgess, whose name was forged in favor of Williamson & Wolfe, on the appellant, and were presented to the two Lexington banks by John R. Wolfe, the payee, and payment asked of these banks. The Fayette Na-

tional Bank, before advancing the money on the first check, made inquiry as to the account of Burgess, and, receiving a satisfactory response, upon the indorsement made by Williamson & Wolfe, paid over the money. Wolfe was identified, and no reason on the part of the Fayette National Bank existed for indulging a suspicion as to the *bona fides* of the transaction. There were sixteen checks in all taken up by this bank, and forwarded to the drawee, the appellant. They were taken in the usual course of business, and when sent to the Georgetown bank charged to the account of its depositor, Burgess. There was in fact no such firm as Williamson & Wolfe, but the fictitious firm name used by Wolfe in the perpetration of his forgeries. Both the appellant and the appellees acted in good faith, the former believing that Burgess was in fact the drawer of the paper, and the latter advancing its money on the checks supposing (Wolfe having been identified) that it would be paid, as it was, by the Georgetown bank, and charged to the account of the drawer.

Which of the banks should lose the money? The bank at Georgetown, where the depositor, Burgess, whose name had been forged, deposited his money; or the banks at Lexington, where the money was paid to Wolfe under the belief that the checks were genuine, and Burgess in fact the drawer? It is evident that the bank at Georgetown honored the checks drawn upon it by Burgess, for the reason that its officers believed the name of the drawer was genuine; and, if the liability of the Lexington banks to refund this money is to be determined by the well-known rule of law applicable to the payment of money through a mistake of fact, the judgment in this case is erroneous. It is insisted, however, that it is a rule of commercial law long since recognized, and now firmly established, applicable at least between parties equally innocent of fraud, that the bank or its officers must know the signature of its depositor; and if such a doctrine is made to apply in this case, the appellant is the loser, and the judgment dismissing its petition was proper. The rule laid down by Lord Mansfield is that, if the banker or drawee makes a payment or gives credit upon the strength of a forged signature, the loss must be his, as between himself and the holder. "He has not known what he is bound to know." *Price v. Neal*, 3 Burrows, 1355. This doctrine of commercial law has been followed and recognized by nearly all

the courts of the country, and as said by Mr. Justice Story in the case of *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, delivered in 1825, has never been departed from, and, in the earlier cases on the subject, able jurists, in alluding to this rule, regarded it as essential as a rule of justice, and right between business men. Mr. Morse, in his work on Banking, has collated the authorities, and presented what he terms the modern doctrine on this subject; but after a careful examination of the authorities referred to, it will be found that the decided weight of authority is with Lord Mansfield, and the rule laid down in *Price v. Neal* is criticised only as being too sweeping in its character. Nor is it just to say that the rule adopted requiring the bank to know the signature of its depositor is without an exception; for it is undoubtedly true that the neglect or knowledge of intervening parties who come into the possession of the check, and receive the money on it from the bank where it is payable, will in some instances be of such a character as to enable the bank to recover back the money.

This doctrine is recognized by Mr. Daniel in his work on *Negotiable Instruments*; and, while doubting the justice of the rule recognized by nearly all the authorities, under which the bank is required to know the signature of its depositor, he proceeds to say that when one knows that it is a forgery, or takes it "under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the bank," the money may be recovered back. Vol. 2, p. 669. The case of *National Bank v. Bangs*, reported in 106 Mass. 441, and relied on by counsel for the appellant in this case, was where a stranger giving his name as "William D. Riskford" drew his check, payable to the order of E. D. & G. W. Bangs, on the National Bank of North America. Bangs indorsed the check, and the bank paid the money, and, when discovering the forgery, notified Bangs, the payee and indorser, and sued to recover the money back; and a judgment was obtained. This, we think, was proper, as it would be an exceedingly harsh rule to permit one who negotiates with the payor, and obtains his check payable to the use of the party obtaining the money, who then indorses it to a bank, to hold on to the money when the payee has himself contracted with the payor, and given credit to the payor by his indorsement, that led the bank to be-

lieve the paper was genuine. The case of *Ellis v. Trust Co.*, reported in 4 Ohio St. 628, sustains this view of the question. The case relied on is unlike the case before us. The banks at Lexington took the checks in the usual course of business, with the indorsement of the payee, and then indorsed the paper for collection, forwarding it to appellant's bank, where the money was credited to the Lexington banks, and charged to the account of the one supposed to be the *bona fide* drawer of the paper. In the case relied on, of *National Bank v. Bangs*, it is said: "If the suit were between the bank or drawee and a party who took the check in the usual course of business, finding it in circulation, or even by first indorsement from the payee, the loss would fall upon the bank; because, having greater means and opportunity to become familiar with the handwriting of their correspondents or depositors, the law presumes that drawees will know their signatures and be able to detect forgeries. * * * But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made." There is a manifest distinction between the case of one who is both the payee and indorser of the check, and who negotiates directly with the payor in the loan or advance of the money for which the check is given, and a bank taking a check by indorsement from the payee in the usual course of business, with no ground of suspicion, and that receives the money on the check from a bank where the funds of the drawer are deposited. One of the two innocent parties must suffer, and there must be some rule of commercial law to guide banks and business men in this character of business transactions. Therefore, when a bank has the means of knowing the signature of the drawer of a check upon it by reason of the drawer being its depositor or customer, the relation between the bank and its depositor is such that the bank must be presumed to know that the signature is genuine when making payment.

The case of *Ellis v. Trust Co.*, reported in 4 Ohio St. 628, recognizes this rule, and says the foundation for it is: "The party is supposed to know his own handwriting in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to

cast upon him the entire responsibility of determining as to the genuineness of the instrument, and, if he fails to discover the forgery, imputes to him negligence, and, as between him and the innocent holder, compels him to suffer the loss." After conceding the general doctrine on the subject, the court proceeds to say that the holder may by his negligent conduct deprive himself of the benefit of this rule, and that case was decided upon the ground that the holder had contributed to induce the payee to believe the paper was genuine. All the cases cited in the text-books or relied on by the appellant, while they criticise the rule as harsh, only make the particular case under consideration an exception to the rule, and permit the recovery by the drawee for the reason that the holder of the paper receiving the money was himself neglectful, and caused the loss, or by his conduct made the drawee believe the paper was genuine. These cases are exceptions to the rule, but all recognize the doctrine that where the parties are equally innocent the drawee paying the money must suffer the loss. The two cases — one found in 22 Neb. 769; 36 N. W. Rep'r, 289, of *First Nat. Bank v. State Bank*, and the other of *People's Bank v. Franklin Bank*, 12 S. W. Rep'r, 716 — go further in discarding the rule than any cases to which our attention has been called; but in those cases the banks upon which the checks were drawn were permitted to recover upon the ground that the banks paying the checks had neglected to make the proper inquiry as to the identity of the holder, who was a stranger, and that this was such a want of precaution as deprived the bank advancing the money of any superior equity as against the bank upon which the checks were drawn. The court expressly says in the *Nebraska* case that the loss may, therefore, be traced directly to the negligence of the plaintiff in error. Whether the facts of those cases justified the conclusion reached is not necessary to inquire, as, after a careful review of all the authorities, it is found that the general doctrine fixing the liability on the drawee in such cases is fully sustained. In the case of *Espy v. Bank*, reported in 18 Wall. 604, the money was paid on a raised check, neither party being in fault. It was held that the money could be recovered back as having been paid without consideration.

The principle involved in the case being considered was not discussed in that case, nor could it have been well applied, as the

bank paying the money could not be presumed to have had knowledge of the fraud practiced by the holder in raising the amount of the check that had been given by its regular depositor. We find no court as rigid in adhering to the rule that a bank is bound to know the signature of its depositor on this kind of paper as the supreme court of the United States. In *Levy v. Bank*, 1 Bin. 27, a forged check, drawn on a bank, and accepted and carried to the credit of the holder when the fraud was discovered, in a few hours after, and it was held that the bank was the loser. And the supreme court, in the case of *Bank of U. S. v. Bank of Georgia*, when discussing the doctrine that the acceptor is presumed to know the drawer's handwriting, said: "After some research, we have not been able to find a single case in which the general doctrine thus asserted has been shaken, or even doubted; and the diligence of the counsel for the defendants on the present occasion has not been more successful than our own." In the case cited, reported in 10 Wheat. 333, the Bank of Georgia issued originally the bank-notes that when put in circulation were fraudulently altered. The Bank of the United States, coming into possession of the notes, presented them to the Bank of Georgia; and the latter received them as genuine; placing the amount to the credit of the United States Bank. The forgery was discovered, and the Bank of Georgia claimed that the Bank of the United States should lose the money. The court held that the Georgia bank must lose, as it was bound to know its own paper. There is a manifest distinction between the last-named case and that of *Espy v. Bank*, reported in 18 Wall. 604. In the case of *Espy*, if the Cincinnati bank had recognized the name of the drawer as genuine, it could not well have known that the check had been raised. It was not the bank's own check, but that of another; and while, as between parties equally innocent, it is presumed to know the signature of its regular customer on the class of paper in question, it is not presumed to know that the amount is all correct, or that no fraud has been perpetrated in that regard.

While it rests upon one signing his own name, or that of a bank affixing its signature, to notes to pass as current money, to know that the signature is genuine, it also rests on a bank, where checks are drawn upon it in the name of its customer, to know his signature; and, instead of the party to whom the money is paid being

required to show negligence in the bank paying the money, it devolves on the drawee to show negligence in the indorser or holder who in good faith has received the money before the drawee can escape liability. When the parties are equally innocent the drawee is the loser. There is no precedent in this court on the question. Still, we are not inclined to follow the views of text-writers, in the face of so many adjudications on the subject, and with no case presented that goes further than to modify the rule in cases where bad faith or negligence is to be attributed to the holder or indorsee when taking the check. Besides, it appears from the finding of facts in this case that Burgess, the real depositor, and whose name has been forged, lived near Georgetown, in which the appellant is located, and was one of its largest depositors. These checks were continued to be paid during a period of nearly five months before the forgery was discovered — a fact, it seems to us, that should be decisive of this case; and while the appellant, by its officers, was acting all the while in the best of faith, believing that the signature of Burgess was genuine, the length of time these checks were being received for collection, and paid without question, by the appellant, must necessarily fix the responsibility where it was placed by the court below. The judgment denying the right of recovery by the appellant is, therefore, affirmed.

HEMINGWAY V. HEMINGWAY.

(19 Atl. R. 766; 58 Conn. 443.)

1. CORPORATIONS. RIGHT OF STOCKHOLDERS AND DIRECTORS TO EXAMINE THE CORPORATE RECORDS. A director in a corporation, who is also active in the management of a rival corporation has no right to examine the records of the former for the benefit of the latter corporation.

2. A director who has gotten possession of any of the records for such a purpose may be forcibly dispossessed thereof by the proper custodian, if the latter can do so without wounding or employing a dangerous weapon.

C. R. Ingersoll for appellant. *D. F. Webster* for appellee.

ANDREWS, C. J. The defendant was on the day named in the complaint the secretary of the M. Hemingway & Sons Silk Company, a joint-stock corporation located in Watertown, and as such

had the charge and custody of the office, and of all the papers of that corporation. On that day the plaintiff came into the office of the corporation, took the letter file from the place where it was usually kept, and commenced to look it over, and to make memoranda from the letters and bills contained therein. The defendant requested the plaintiff to return the letter file to him, as he wanted it. The plaintiff refused to give it up, and thereupon the defendant forcibly took it from him, using no more force than was necessary for that purpose, but in so doing scratched the plaintiff's hands so that the blood came, which was the assault alleged in the complaint. The plaintiff was a stockholder in, and a director of, the corporation; and he claims that he rightfully refused to return the letter file to the defendant by reason of his so being a stockholder and a director. The finding also shows that he had been engaged with others in organizing, and that he was active in the management of, another silk company in the same town, rival to the one above named, and that he was using the letter file at the time of the alleged assault, and taking the memoranda therefrom, for the benefit of such other company.

It may be admitted that a stockholder or a director in a joint-stock corporation has the right at any reasonable and proper time to examine and inspect the books and papers of the corporation, whenever it is necessary to do so for the protection of his interests as a stockholder, or for the performance of his duties as a director. The statement of this right implies that such examination could not be had at any other time or for any other purposes; and it clearly implies that such examination could not be rightfully had for a purpose hostile to the corporation. "The directors or trustees of a corporation, in accepting their appointment to office, impliedly undertake to give the company the benefit of their best care and judgment, and to use the powers conferred upon them solely in the interest of the corporation. They have no right, under any circumstances, to use their official positions for their own benefit, or the benefit of any one except the corporation itself. * * * It is a general rule that the powers conferred upon an agent must be exercised to advance the interests of the principal, and for no other purpose." 1 Mor. Priv. Corp., § 517. See, also, *Alford v. Miller*, 32 Conn. 543; *Hoyle v. Railroad Co.*, 54 N. Y. 314. When the plaintiff was using the letter file for

the benefit of his rival company, he was misusing his power, and betraying his trust, as a director of the M. Hemingway & Sons Company. His being a director in that company, so far from being an excuse to him for refusing to return the letter file upon request, was an imperative reason why he should have complied with the request. A breach of his duty as director does not excuse or palliate his breach of the law in withholding the letter file from its authorized custodian. "It is settled by ancient and modern authority that under such circumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force short of wounding, or the employment of a dangerous weapon." *Com. v. Donahue*, 148 Mass. 529; 20 N. E. Rep'r, 171; *Baldwin v. Hayden*, 6 Conn. 453; *State v. Elliot*, 11 N. H. 540; *Com. v. Lynn*, 123 Mass. 218. There is error, and the judgment is reversed. In this opinion the other judges concurred.

Right of stockholder to inspect the corporate books.—A recent decision of the supreme court of Pennsylvania on this subject is as follows:

"GREEN, J. We are of opinion that the purpose avowed by the relator in his petition for a *mandamus* is not a proper purpose, such as will entitle him to the writ. Substantially, he desires to file a bill in equity to set aside a lease by the defendant corporation to another corporation, of all its property and franchises, for a long term. He wishes to obtain a list of the stockholders, so that he may confer with his fellow-stockholders, in order that they may join him in his litigation, and share the expenses with him. This is nothing more than a desire to induce others to help him carry on a litigation, and divide the expenses thereof. He does not allege that he will be in any way injured by the proposed lease, or that there are others whose rights will be injured, or that they are necessary parties, or that he cannot maintain his bill without them. He simply claims an absolute and unqualified right, not merely to inspect the books and stock-list of the defendant, but to make a copy of the list of stockholders, and for the one purpose mentioned. The constitution of 1874 (art. 17, § 2) does not confer any such right. It simply provides that a list shall be kept at the office of the company, and that it shall be open to inspection of stockholders and creditors, but does not confer the right to take copies of the list. But even if it did confer such a right, we hold that it can only be exercised for a reasonable and proper purpose. We so held in the case of *Com. v. Iron Co.*, 105 Penn. St. 111, saying, distinctly, that 'the interests of all the corporators require that the writ [*mandamus*] shall not go at the caprice of the curious or suspicious.' In the present case the relator desires to have an opportunity to solicit other stockholders to join him in a litigation against the company, not because such stockholders have suffered any wrong, but because he desires them to share the expense of such litigation with him. It is very easy to understand how such a combination of

stockholders might be used for speculative purposes; but, without the statement or definition of some wrong or injury which the relator or the others may suffer in consequence of a denial of the right to make a copy of the list of stockholders, we cannot appreciate the propriety of the court's lending the aid of a *mandamus* to a litigant who avows no other purpose than the one stated. The relator does not even say that he is too poor to carry on the proposed litigation himself. In fact, he avers no necessary reason, that a court can recognize, for the use of the writ. If he had a copy of the list, he would have the opportunity of soliciting others to join him, in order that money might be made by a combined movement, which the company would prefer to buy off, rather than incur the annoyance and expense of a protracted litigation; but, of course, no court would ever lend its aid to the promotion of such a result as that. The writ was refused in the following cases, in which the right of inspection exists quite as broadly as in our own state: *Buck v. Collins*, 51 Ga. 391; *Webber v. Townley*, 43 Mich. 534; 5 N. W. Rep'r, 971; *Bean v. People*, 7 Colo. 200; 2 Pac. Rep'r, 909. We think the writ was improvidently granted by the learned court below, and, therefore, the judgment is reversed and the petition is dismissed, at the cost of the appellee." *Appeal of Empire Pass. Ry. Co.*, 19 Atl. Rep'r, 629.

DOWD V. STEPHENSON.

(10 S. E. R. 1101; 105 N. C. 467.)

1. **BANKS AND BANKING.** This is a suit by the plaintiff, as receiver of the State National Bank, to recover from the defendant the amount of an overdraft made as follows: The president of the bank was indebted to the defendant and directed him to draw checks on the bank for the amount and they would be paid by the bank and charged to the president. The defendant drew checks for the amount in question, which were paid by the bank, it being understood by the cashier and book-keeper that the checks were paid on account of the president. The president's account was overdrawn at the time. The directors knew nothing of the arrangement. While matters were in this condition, the bank went into the hands of a receiver. Held, that the defendant was liable, that he should have known that the president had no right to appropriate the funds of the bank to the payment of his private debts, and should have seen that the transaction was duly authorized by the directors.

J. U. Holding for appellant. *Busbee & Busbee* for appellee.

MERRIMON, C. J. The following is a copy of the material parts of the case settled on appeal: The plaintiff complained of the defendant for the sum of \$273.42 and interest, claimed to be due for money paid out on defendant's written requests or checks, by the State National Bank; in other words, an overdraft for that

amount. The plaintiff was the receiver of the bank. The defendant admitted drawing the checks and the payment of the money by the bank to the amount of the overdraft, but denied any indebtedness to the bank or to the receiver, upon the ground stated in the answer. It was in evidence, without contradiction and admitted by both parties, that C. E. Cross was president and S. C. White was cashier of the State National Bank in 1887, and up to March 26, 1888. The defendant tendered an issue: "To whom was credit given by the bank in the payment of the checks for the alleged overdraft?" His honor stated that the issue in this form involved an inference of law, and that the court would decline to submit it; that the issue would be, "Is the defendant indebted to C. Dowd, receiver, and, if so, in what amount?" and upon that issue the court would charge upon the matters involved. Defendant excepted.

The defendant introduced the following testimony: Charles E. Cross: "In 1887 and 1888, up to March 26, I was president of the State National Bank. S. C. White was cashier. I instructed White, the cashier, to pay the checks of defendant. I was indebted to defendant personally in a considerable amount for 'logging' or supplying logs to my saw-mill. It had been my habit, in settling with defendant, to tell him to draw checks on the State Bank, and I would have them paid. I did this for my convenience. Defendant did so, and drew the checks constituting the overdraft claimed by plaintiff to be due. The checks were paid. Defendant's account had been overdrawn before, though he did not know it, and I had made it good. I told the cashier to look to me for the payment of these checks, and I also told Stephenson that I would pay them. I was indebted at that time to the defendant more than the amount of the overdrafts. Cross-examined: My account was largely overdrawn at the time the checks were paid. I expected to receive some money, and to make a deposit to meet these checks. The directors were not consulted about this matter. They were not consulted usually in small loans nor in ordinary cases about the payment of checks. I did not wish to increase my own overdraft. I did not make a deposit to Stephenson's credit. It was my habit to make the deposits to his credit at the end of each month." S. C. White, witness for defendant: "I was cashier for years prior to and in 1888-

I controlled the cashing of checks. Defendant was in the habit of drawing checks on the bank. Cross, the president, told me to pay all of defendant's checks; that he was responsible for them, and would pay them. I honored these checks on Cross' credit, and looked to him to pay them. Cross had paid former drafts. Mr. Womble, the book-keeper, knew of these transactions. No notice was sent to the defendant of his overdrafts. It was usual to send notices. The checks were charged on the books of the bank to the defendant. No deposit was ever actually made by Cross to meet them." L. D. Stephenson, the defendant: "I received no notice of any overdraft. Mr. Cross employed me to get logs for his mill, and I had instructed him to place what he owed me to my credit in the bank, and also \$700 for land and \$1,000 for another tract of land, and I thought when I drew those drafts that he (Cross) had placed money to my credit. I was never notified of an overdraft. Bank was closed Saturday, March 26, 1888. The book-keeper was instructed to notify all persons who had overdrawn. I had dealt in same way with Mr. Cross to the amount of \$5,000. I did not know of the insolvency of the bank or Cross, or of Cross' indebtedness to the bank." Upon the evidence of the defendant, his honor instructed the jury that the plaintiff was entitled to recover. Verdict and judgment as set forth in the record. The defendant excepted to the charge. From the judgment the defendant appealed.

The material part of defendant's answer is as follows: "(2) He admits giving checks on said bank for the amounts set out in the complaint, but denies that he owes any thing on that account, and avers the facts connected therewith to be as follows: C. E. Cross, president of said bank, being indebted to this defendant, requested him to give checks on said bank to the amount of his claim, and that the bank would pay the same. This defendant had, prior to this, dealt in a similar way with C. E. Cross, president of said bank, to the amount of many hundred dollars, and the bank paid the checks of this defendant without his putting any money to his credit. (3) Not only the president, but the other officers, of said bank knew, when they paid the check set out in the complaint, that the money was paid on account of the indebtedness of C. E. Cross, president of said bank, to this defendant, and was not intended to be charged to this defendant, the same being paid by

said bank on the account of C. E. Cross, president of said bank, and intended to be a charge against him only. (4) The president of said bank was, at the time said checks were drawn and paid, indebted to this defendant to an amount much in excess of the checks drawn as above, which said bank agreed to pay, and is claimed as an offset to plaintiff's demand."

The court gave judgment as follows: "Hereupon it is adjudged that the plaintiff recover against the defendant the sum of two hundred and seventy-three dollars and forty-two cents, with interest on \$273.42 thereof from the 13th day of March, 1888, until paid, together with costs and disbursements."

The issue tendered by the defendant did not embrace the whole matter of fact at issue; that submitted by the court did, and was sufficient. In the absence of special authority for such purpose, neither its president nor its cashier, nor these officers acting conjointly, had authority or right to appropriate and devote any part of the funds of the bank, of which the plaintiff is receiver, to the payment of such president's personal debt due to the defendant. Such authority ordinarily was beyond the scope of the purpose and duties of such officers. No doubt the directors — the governing authority of the bank — might allow them to exercise such power, or they might ratify such transaction, but it must in some way sufficiently appear that they did. *Grant Banks*, § 143 et seq; *Grant Banks*, § 171 et seq. The defendant had no deposit in the bank, nor did it owe him any thing, nor was it in any way bound to recognize and pay his checks or orders on it for money. It did, however, pay them to his use and benefit. He thus obtained money from it by the unauthorized and fraudulent acts of its officers. Cross had no right or authority to tell the defendant the bank would pay his checks. This the defendant ought to have known. It was his duty to himself and to the bank to see that such permission to draw upon it was authorized. It was his misfortune that he dealt with and confided in its faithless officer, and not with and in it. The mere fact that he had drawn checks that had been paid before, under like circumstances, was no excuse or justification for drawing those in question; certainly not in the absence of knowledge of such transactions on the part of the directors of the bank. If the latter connived at or authorized, by implication or otherwise, such payment of the

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checks of the defendant, he should have proven the fact. The checks were not properly "overdrafts," — the defendant did not have any deposit or credit upon which to overdraw. He got and had benefit of the bank's money in a way not authorized or intended by it, and very certainly it can recover that money by proper action, as the present one is. *Morse Banks*, § 360; *Bolles Banks*, 358; *Bank v. Byram*, 39 Me. 489.

Judgment affirmed.

Officers applying corporate funds to payment of individual debts — notice. — An officer of a corporation has no right, as such, to convert the property of the corporation to his personal use. And one who receives from such an officer the notes, securities or property of the corporation in payment of, or as security for, the individual debt of such officer, is chargeable with notice of the rights of the corporation, and unless such disposition of the corporate funds was, in fact, duly authorized, he will be liable to restore the same to the corporation, or account for their value. *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145; *Garrard v. P. & C. R. Co.*, 29 Penn. St. 154; *Pendleton v. Fay*, 2 Paige, 202.

McCULLOUGH V. EXPRESSMAN'S MUTUAL BENEFIT ASSOCIATION.

(19 Atl. R. 355; 183 Penn. St. 142.)

1. MUTUAL BENEFIT SOCIETIES. INSANITY IS SICKNESS OR DISABILITY. The constitution and by-laws of a mutual benefit society, provided that every member "who, through sickness or other disability, is unable to follow his usual business," etc., should be entitled to a certain sum weekly. Held, that insanity was sickness or disability within the meaning of the constitution and by-laws.

John F. Develin and *W. Horace Hepburn* for plaintiff in error. *Thomas R. Elcock* for defendant in error.

MITCHELL, J. The jury have found for the plaintiff, and we must, therefore, assume that all the necessary facts were duly proved. This disposes of a considerable part of the argument for the appellee, and leaves open to us only the question of law involved in the point reserved — whether insanity is sickness or disability, within the meaning of the contract. The operative words are contained in the following passages from the constitution and by-laws of the association. Const., art. 9: "Every

member * * * who, through sickness or other disability, is unable to follow his usual business or some other occupation whereby he may earn a livelihood for himself and family, shall be entitled to such sums (as weekly benefits) as the by-laws shall specify;" and by-laws, art. 13, § 1: "Any member who after twelve months' membership, through sickness or disability, is unable to follow his usual or some other business or occupation whatsoever, * * * shall receive," etc. We cannot regard the meaning of this language as at all doubtful. That insanity is a sickness in some senses of the word is beyond question, and such legal authorities as appear to have considered the question hold that it is sickness, within the meaning of such charters and articles of association as the defendant's. Thus in *Burton v. Eyden*, L. R., 8 Q. B. 295, an action against a "friendly society," the English designation of associations like the present appellee, the words of the by-law were: "During any sickness or accident that may befall him." Blackburn, J., said: "I am of opinion that lunacy is sickness, within the meaning of the rules of this society. * * * Insanity depends on the state of mind and body of the person. * * * It certainly seems to me that lunacy is a sickness affecting the health of the body in such a way as to prevent a man's ability of earning his livelihood. If it were not the intention to include it, the rules of the society should be framed so as expressly to exclude it." And Quain, J., said further: "I am also of opinion that insanity is sickness, within the society's rules. * * * The words * * * entitling the member to relief are, 'during any sickness or accident,' except certain excluded cases, insanity not being one." In *Kelly v. Ancient Order*, 9 Daly, 292, Van Brunt, J., says: "Insanity has always been considered a disease, and comes strictly within the meaning of the term 'sickness.'" And in *Pellazzino v. Society*, 16 Wkly. Cin. Law Bull. 27, it is assumed by Harmon, J., apparently without question by either party, that insanity entitles a member of such society to sick benefits. But, even if the extent of the word "sickness" were doubtful, the present case is relieved of all difficulty by the additional phrase "other disability." The purpose of the association is defined by article 2 of the constitution as the accumulation of a fund to enable the members "to assist each other in cases of accident, sickness or other distress, and

their families in case of death." The common class of those who are expected to need the benefits is defined in article 9, as already said, as those who, through sickness or other disability, are unable to follow their usual or some other business, whereby they may earn a livelihood for themselves and their families. To this class is added another in article 10, to-wit, the families of members who die, and members themselves whose wives die. The latter are clearly examples of that pecuniary distress which is enumerated in the constitution among the ills which it is the object to relieve. But the main idea throughout is the assistance of those who are incapacitated for earning their living, and the condition that the incapacity shall be from "sickness or other disability" is as comprehensive as language could well make it. If insanity is not sickness, it is certainly disability, and clearly within the prescribed condition for aid. Certain excepted cases are specified, but not only is insanity not one of them, but all of those which are thus specified, such as want of membership for twelve months, arrearages to the association, or sickness originating from intemperance, vicious or immoral conduct, either fail in some necessary requirement or bear some taint of fault which takes them out of the category of the innocent unfortunate for whom the relief is intended. If any of these exceptional facts were charged against the plaintiff, the verdict of the jury has settled them in his favor, and there is no reason shown why he should not have the relief to which under the rules of the association his disability entitles him.

Judgment reversed, and new judgment for plaintiff on the verdict.

ARKANSAS MIDLAND RAILROAD COMPANY V. CANMAN.

(18 S. W. R. 380; 52 Ark. 517.)

1. RAILROAD COMPANIES. PRESUMPTION OF NEGLIGENCE FROM DERAILMENT. Plaintiff was a passenger on one of the defendant's trains composed of both freight and passenger-cars. The car in which he was riding was derailed and he was injured. Held, that the law presumed negligence from the fact of derailment, and that the plaintiff would be entitled to a verdict, unless the defendant overcame the presumption by proof that the accident was without its fault.

2. Negligence cannot be inferred from the mere fact that there was a spread

or bent rail at the time and place of the accident, and it is error to so instruct the jury.

3. INSTRUCTIONS. JURY TO BE SATISFIED. It is error to instruct a jury that they must be *satisfied* upon a given point. They should give their verdicts upon the preponderance of the evidence alone, or against the party who has the burden of proof where the evidence is evenly balanced.

4. MIXED TRAINS. DUTY AS TO APPLIANCES. The duty of railroad companies as to the number of tracks it should have, the running of separate passenger and freight trains, and the use of safety appliances, vary with the circumstances of the case, depending upon the amount of traffic and other considerations. They are bound to a very high degree of care and diligence in the management of their roads and trains, but are not required to do what is unreasonable or impracticable, though possible.

5. SPECIAL VERDICTS. Where a verdict may be sustained upon different views of the evidence, the jury need not concur in any particular view. If particular questions are put to them to be answered, involving such different views, an answer thereto that they fail to agree is not necessarily inconsistent with a general verdict, but if a particular question *must* be answered before they can find a verdict, an answer that they failed to agree thereon would be inconsistent with a general verdict.

John J. & E. C. Hornor for appellant. *Stephenson & Trieber* and *E. W. Kimball* for appellee.

BATTLE, J. The Arkansas Midland Railroad Company is a corporation owning and operating a railroad between Helena and Clarendon, in this state, for the carriage of passengers and freight to and from its termini and intervening points. It has never run trains, exclusively, for transporting passengers, but the trains on which it has carried them were composed of passenger and freight-cars, and carried freight. On the 12th of January, 1888, for a valuable consideration, it undertook to carry O. G. Canman, as a passenger, on a train composed of two box-cars, a baggage-car, and two passenger-coaches, from Helena to Clarendon. The box and baggage-cars were placed in front of the coaches. The train was not provided with air-brakes nor with bell-pulls, but was furnished with hand-brakes and two brakemen. Canman took a seat in one of the coaches. The train moved out, and was running at the rate of about eight miles an hour, and had gone a short distance when the coach in which Canman was seated left the track, turned over, and severely injured him. For the damages he suffered in consequence of the injuries received he brought this action, and alleged that they were caused by the negligence of the railroad company.

The foregoing facts were proven on the trial. It was also proved that the road-bed of the defendant was ballasted with dirt; and evidence was adduced tending to prove that it was impracticable to use a bell-rope and air-brakes on a train composed of freight and passenger-cars; that the coach that was overturned was derailed at a point where a rail in the track, on the east side was slightly bent out of line, and "a spike seemed to be pushed toward the east;" and that, in leaving the track, the wheels on the east side of the coach went between the rails, and the others on the outside and west of the track.

Among other instructions, the court gave the following, over the objections of the defendant, to the jury:

"(1) Where a passenger for hire, being carried on the train of a railroad company, is injured without fault of his own, the law presumes that the railroad company has been guilty of negligence, which presumption the railroad must remove by evidence; and if the jury find that plaintiff, while a passenger as aforesaid on defendant's train, was injured without any fault of his own, and the defendant has failed to satisfy you by the evidence introduced that it was not through its fault that the accident occurred, or that it was caused by plaintiff's own or contributory negligence, the verdict must be for the plaintiff.

"(2) If the jury find from the evidence that there was a spread or bent rail at the time and place of derailment, the jury may infer negligence from that fact, and the burden of disproving it is on the defendant."

The defendant asked, and the court refused to give, the following instruction: "If the jury find from the testimony that the train on which plaintiff was a passenger at the time he was injured was a mixed train for carrying passengers and freight, and that such train at the time when such injury was received was not provided with air-brakes or a bell-cord, and if they further find from the testimony that it is not practicable to use air-brakes and bell-cord on such trains, then the jury are instructed that the want of such appliances was not negligence in defendant."

The defendant asked for further instructions as to the degree of diligence, care, skill and prudence it was bound to exercise in the construction, maintenance and operation of its railroad, which the court refused to give.

The result of the trial was a verdict and judgment in favor of plaintiff, and an appeal by the defendant to this court.

The first instruction, construed in connection with the other instructions given, contained no errors. More appropriate words, however, and words adapted to express the idea intended, should have been used instead of the word "satisfy." In order to overcome the presumption of negligence, it was not necessary for the defendant to introduce evidence sufficient to convince the jury, beyond a reasonable doubt, that it had not been negligent. "It is never necessary," says the court in *Shinn v. Tucker*, 37 Ark. 589, "in a civil case, that a jury should be satisfied of the truth of their verdict, in the sense of resting upon it confidently. That principle belongs to criminal law. Civil verdicts should be given on preponderance alone for the party whose evidence, considered altogether, outweighs that of the other as to the facts in issue, or against the one having the *onus*, if, on the whole, the weight seems balanced."

The second instruction given was erroneous. It assumes that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment of a car, or in some manner impair the safety of the train. It is true that the court instructed the jury that, if they found that the accident to the train was occasioned by a defect in the road-bed or track, and that defendant had taken all the means which would have been taken by a cautious and prudent person in the exercise of the utmost prudence to prepare and maintain its road-bed and track where the car was derailed," the defendant would not be liable; but at the same time it told the jury, in effect, that, if they found that there was a spread or bent rail at the time and place of derailment, they might infer that the defendant had not used such means and prudence, and was guilty of negligence.

Railroad companies "are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers." While the law demands the utmost care for the safety of the passenger, it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril.

They are not required, for the purpose of making their roads perfectly safe, to incur such expenses as would make their business wholly impracticable, and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger, reasonably consistent with their business, "and appropriate to the means of conveyance employed by them," and to adopt the highest degree of practical care, diligence and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same. *Railroad Co. v. Derby*, 14 How. 486; *Simmons v. Steamboat Co.*, 97 Mass. 361; *Railroad Co. v. Thompson*, 56 Ill. 138; *Perahing v. Railroad Co.*, 32 N. W. Rep'r, 488; 2 Wood Ry. Law, § 301, pp. 1074, 1079, and cases cited; *Hutch. Carr.*, §§ 502, 529, and cases cited; *Patt. Ry. Acc. Law*, § 247.

In *Railroad Co. v. Horst*, 93 U. S. 291, which was an action against a railroad company for injuries received by the plaintiff while riding on a cattle train, the court, after saying, "The highest degree of carefulness and diligence is expressly exacted" of railway companies, said: "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight trains air-brakes, bell-pulls, and a brakeman upon every car; but it does emphatically require every thing necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed."

Was appellant required to run separate passenger trains on its road? All carriers are not required to adopt like expensive provisions for the safety of passengers. The business of a road might render it unsafe to use a single track, and necessary to the safety of passengers to use a double one. It would, unquestionably, be safer for all railroads to have two tracks, and run all trains going in the same direction over the same track. But this does not make it the duty of all railroads to have double tracks. The pro-

visions required to be adopted by passenger carriers for the safety of their passengers vary as the exigencies of the traffic and its remunerative character demand and justify. A railway constructed through a thinly-settled country, moving but little freight and few passengers, and running its trains at a slow rate of speed, cannot be expected to be equipped and operated in the same manner as is necessary in the case of a railway running through a densely-populated territory, and moving a large volume of traffic. So the line of a railroad may be so short, and the business done by it so small, as to make it unreasonable to require it to run separate trains for freight and passengers. If the business done does not warrant it, it would be unreasonable and oppressive to demand it, and it would not be required. But, on the other hand, if the business was sufficiently large and profitable to warrant it, and the safety of the passengers was endangered or diminished by having the passenger-coaches mixed in the same train with freight-cars, it would clearly be the duty of the railway company to run separate trains.

If it was not the duty of appellant to run separate passenger trains, then, under the statutes of this state, it was its duty, in forming its trains, to place the baggage and freight-cars in front of the passenger-coaches. Mansf. Dig., § 5477. Under such circumstances, the law would not require bell-pulls and air-brakes to be used on such trains, if it was impracticable to do so. But, on the other hand, if the rule as to care and diligence already laid down required them to be used, it was the duty of appellant to have done so.

Another question is presented for our consideration. The statutes of this state provide that the court may require the jury, "in any case in which they render a general verdict, to find specially upon particular questions of facts to be stated in writing," and that, "when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Mansf. Dig., §§ 5142, 5143. In pursuance of these statutes, the court propounded interrogatories, and gave instructions to the jury, on motion of the appellant, as follows:

"(1) Was the derailment of the coach in which plaintiff was a

passenger caused by the insufficient skill and care of defendant in constructing its road-bed?

"(2) Was the derailment of the coach in which plaintiff was a passenger caused by the want of skill and prudence of defendant in maintaining its road-road?

"(3) Was such derailment caused by the defect in the rolling stock in defendant's train, or any of its appliances?

"(4) Was such derailment caused by any negligence in operating such train?

"(5) If the jury find negligence in either case, they will state in what said negligence consisted.

"(6) If the jury find that after the derailment of the car the track was torn up, and the ties broken, they will state whether the tearing up of the track and the breaking of the ties contributed to the injury of the plaintiff, and, if so, in what way and to what extent."

And against the objection of the defendant, instructed the jury as follows:

"If the jury find negligence, and cannot agree what the particular negligence was which caused the derailment of the car, they may so state.

"If the jury find that the derailment was caused by a bent rail or spreading of the track, say so."

To each of the interrogatories the jury responded: "We fail to agree;" and further said: "We find negligence on the part of the defendant, but fail to agree as to what particular neglect caused the derailment of the train."

It is contended by the appellant that the court erred in instructing the jury that, if they found that the appellant had been guilty of negligence, and could not agree as to what the negligence which caused the derailment was, they might so state; and insists that, before a verdict could have been legally returned against it, there must have been an agreement of the minds of the twelve jurors as to the existence of some particular fact constituting negligence, and that they must have agreed on an affirmative answer to one of the interrogatories. The correctness of this contention depends on the evidence. It is not necessary that a jury, in order to find a verdict, should, in all cases, concur in a single view of a transaction or occurrence disclosed by the evidence. If the verdict is

sustained by any one of two or more interpretations of the evidence, it cannot be impeached by showing that a part of the jury proceeded upon one interpretation, and a part upon the others. *Murray v. Insurance Co.*, 96 N. Y. 614; *Railway Co. v. Dunleavy*, 22 N. E. Rep'r, 15. But, if they must necessarily agree upon the answer to any particular question before they can find a verdict, they would be guilty of a violation of duty, if they returned a general verdict without doing so. *Ebersole v. Railroad Co.*, 23 Hun, 114. If they should reply to such a question to the effect they cannot agree, the court ought not to receive their verdict, as the reply and verdict, in that case, would be in irreconcilable conflict. As to the consistency of the verdict, and the answers of the jury to the interrogatories in this case, we express no opinion.

Reversed.

Derailment of car is presumptive evidence of negligence. — *George v. St. Louis, etc., R. Co.*, 84 Ark. 618; *L. R. & F. S. Ry. Co. v. Miles*, 40 Ark. 298; *Denver, etc., Ry. Co. v. Woodward*, 4 Col. 1; *Younge v. Kinney*, 28 Ga. 111; *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462; *Cleveland, etc., Ry. Co. v. Newell*, 75 Ind. 542; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264; *Louisville, etc., Ry. Co. v. Jones*, 108 Ind. 551; *Pittsburgh, etc., R. Co. v. Thompson*, 56 Ill. 138; *Peoria, etc., R. Co. v. Reynolds*, 88 Ill. 418; *Edgerton v. New York Central, etc., R. Co.*, 39 N. Y. 227; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562; *Brignoll v. Chicago, etc., R. Co.*, 4 Daly, 182; *Felton v. Middlesex R. Co.*, 109 Mass. 898; *Texas & St. Louis R. Co. v. Suggs*, 62 Tex. 323; *Sullivan v. Philadelphia, etc., R. Co.*, 30 Penn. St. 234; *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236; *Moore v. Des Moines, etc., R. Co.*, 69 Iowa, 491; *Wilson v. Northern Pacific R. Co.*, 26 Minn. 278, *Baltimore, etc., Turnpike Co. v. Leonhardt*, 66 Md. 70; *Carpue v. London & Brighton Ry. Co.*, 5 Q. B. 747; *Dawson v. Midland Ry. Co.*, 7 H. & N. 1087.

In *White v. Boston & Albany R. Co.*, 144 Mass. 404, the shade of a car lamp fell and cut the plaintiff's face. It was held negligence might be presumed from the fact that the shade fell.

NEWMAN v. METROPOLITAN ELEVATED RY. Co.

(23 N. E. R. 901; 118 N. Y. 618.)

1. ELEVATED RAILWAYS. DAMAGES TO ABUTTING PROPERTY. HOW ESTIMATED. In estimating the damages to abutting property by reason of an elevated railroad in front of it, any benefits peculiar to the property in consequence of the construction of the road should be taken into consideration,

although the statute provides that in determining the compensation to be made for property taken, no allowance or deduction shall be made "on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railway."

2. GENERAL BENEFITS NOT TO BE CONSIDERED. The general increase of values resulting from the construction of railroads and other improvements, belongs to the property owner, and is not to be taken into consideration in estimating his compensation for property taken or damaged.

APPEAL from a judgment of the general term of the first judicial department, affirming a judgment entered in favor of plaintiff upon a verdict, and affirming an order denying a motion for a new trial.

At the commencement of this action the plaintiff held a lease of property situated upon the north-west corner of Church and Rector streets, in the city of New York. The lease bore date May 1, 1877, and was for the term of fifteen years, with a right of renewal for an additional term of ten years. Upon the property there was a brick building five stories in height, the first floor of which was used as a restaurant, and the other floors for dwellings. The Metropolitan Elevated railway was constructed through Church street in front of said premises, and in Rector street there had been erected by the defendants a station, from which a covered platform ran to Greenwich street, and there connected with the Ninth Avenue Elevated road. The plaintiff claimed in his complaint that the defendants' structure interfered with the ingress and egress to and from his premises, and also impaired the circulation of light and air from the street to his building, and deprived him of its customary and lawful use, and greatly reduced its value to him as lessee. It was admitted that the action was brought and tried as one to recover in one sum the whole damage sustained, and to be sustained, from the depreciation of the plaintiff's estate, on the assumption that the defendants' structure caused a permanent impairment of the easements in the street for light, air and access. The court, having charged the jury that "the damages to plaintiff's leasehold were to be measured by the depreciation of rents caused by defendants' structure, in depriving the premises of the accustomed light, air and egress which it had before said structure was placed thereon," and that, in considering the question of damages, "the fact that real estate had risen generally in that district of the city did not relieve the rail-

road company from the element of damage," was requested by the defendants to charge as follows: "That, in estimating the damages to the leasehold interest in this plaintiff caused by the interference by the defendants with the light, air and access appurtenant to the premises, the jury may take into consideration any benefits peculiar to his house which have arisen by the construction of the road, as shown by the evidence." To this the court replied: "That I refuse to charge; on the contrary, the jury have no right to take any such fact into consideration." The defendants gave evidence tending to show, and from which the jury might have found, that while the upper parts of the building had been made less desirable for dwellings by reason of the erection of the defendants' structure, and in consequence thereof the rents had fallen, the location of the station in Rector street had, from the greater number of people resorting there, caused the first or store floor of the building to become more desirable for business purposes, and greatly enhanced in rental value.

Julien T. Davies, Edward S. Rapallo and W. Bourke Cockran for appellants. *James M. Smith and Inglis Stuart* for respondent.

Brown, J. (after stating the facts as above). The basis of the court's refusal to charge as requested is to be found in the Rapid Transit Act (chap. 606, Laws 1875, § 20), and in the General Railroad Law (chap. 140, Laws 1850, § 16), which by section 3, chapter 885, Laws 1872, was made applicable to the Gilbert Elevated Railroad Company, to whose rights the Metropolitan Railway Company succeeded. These laws provide that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways formed thereunder, "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railway." What is the true meaning of this provision, and how far is it applicable to a case of the character we are considering, is the question we are to determine upon this appeal.

The principle upon which compensation is to be made to the

owner of lands taken by proceedings under the General Railroad Law has been frequently considered by the courts of this state; and the rule is now established that such owner is to receive — First, the full value of the land taken; and, second, where a part only of land is taken, a fair and adequate compensation for all injury to the residue sustained, or to be sustained, by the construction and operation of the railroad. *Railroad Co. v. Lee*, 13 Barb. 169; *In re Utica R. Co.*, 56 Barb. 456; *In re Prospect Park & C. I. R. Co.*, 13 Hun, 345; *In re New York C. & H. R. R. Co.*, 15 Hun, 63; *In re New York, L. & W. R. Co.*, 29 Hun, 1; *In re New York, L. & W. R. Co.*, 2 N. Y. Supp. 478; *Henderson v. Railroad Co.*, 78 N. Y. 423. The first element in the award represents the compensation for land which the railroad takes, and to which it acquires title. The second element represents damages which are the result or consequences of the construction of the road upon property not taken, and which the owner still retains. Such damages are wholly consequential, and to ascertain them, necessarily involves an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting, and to result, therefrom. The rule is well stated in *Lewis Em. Dom.*, § 471, as follows: "Where part of a tract is taken, just compensation would, therefore, consist of the value of the part taken, and damages to the remainder, less any special benefits to such remainder by reason of the taking and use of the part for the purpose proposed." In this rule, thus settled in this state, and which controls all awards for taking of land under the General Railroad Act, is to be found the true application of the statutory provision which forbids deductions and allowances to be made by commissioners for any real or supposed benefits which the parties interested may derive from the construction of the railroad. Whatever land is taken must be paid for by the railroad company at its full market value; and from such value no deduction can be made, although the remainder of the land-owner's property may be largely enhanced in value as a result of the operation of the railroad. But, in considering the question of damages to the remainder of the land not taken, the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries; and, if the re-

sult is beneficial, there is no damage, and nothing can be awarded. The rule established under the General Railroad Law must govern and control awards made under the Rapid Transit Act. The last-named act confers upon corporations formed thereunder the power to acquire property for railroad purposes; and the statutory proceedings prescribed are substantially the same as those under the General Railroad Act; and no reason is apparent why the same rule should not apply to proceedings under both acts.

This court has decided that owners of land abutting upon public streets have easements therein for ingress and egress to and from their premises, and for the free circulation of light and air to their property; which easements are interests in real estate, and constitute property, within the meaning of that term as used in the constitution. The easement is the property taken by the railroad company. But in estimating its value it is impossible to consider it as a piece of property, separate and distinct from the land to which it is appurtenant; and the right of the property-owner to compensation is measured, not by the value of the easement in the street separate from his abutting property, but by the damages which the abutting property sustains as a result or consequence of the loss of the easement. It follows that, in making an award to a party situated as the plaintiff was with reference to the defendants' railroad, there would be no compensation for property taken beyond a nominal sum, and that his right to recover would rest chiefly upon proof of consequential damages. An estimate of such damages, as I have already shown, involves an inquiry into the effect of the railroad upon the whole property and a consideration of all its advantages and disadvantages. If the rental value of the whole building was shown to have been diminished, there was injury, for which plaintiff was entitled to recover; but if the diminished rental value of the upper floors was equalled or overcome by increased rental value in the store, then there was no injury, and no basis for a recovery of substantial damages against the defendants.

While the precise question presented by the exception in this case has not heretofore been decided in this court, it is covered by the decisions under the General Railroad Law which have been cited; and the rule established by those decisions has recently been applied in the second judicial department to the case of an elevated

railroad. In re Brooklyn El. R. Co., 8 N. Y. Supp. 78. That case was an appeal by property-owners from an award of nominal damages in proceedings by an elevated railroad company to condemn an easement in a street. The court said: "This inquiry necessarily takes in the advantages from the railroad when the extent of the injury is to be based upon the diminution of value by reason of its construction." "The basis of appraisalment must then be the difference in value between the abutting house before the construction of the railroad and afterward." In Drucker v. Railway Co., 106 N. Y. 157; 12 N. E. Rep'r, 568, this court held admissible evidence offered by the property-owner that trade and business had fallen off in the street since the erection of the railroad, and that property was for that reason diminished in value. If such evidence is competent to sustain a recovery, it is difficult to see why it is not competent for the railroad company to show that the effect of the road has been to cause an increase in business and hence an enhancement of the value in abutting property. The question whether, in awarding damages flowing from the construction of a railroad, its injurious effect upon a part of a residue of a tract of land could alone be considered, has been expressly decided in Illinois. Page v. Railroad Co., 70 Ill. 324. That case was an assessment of damages for a right of way across a tract of forty acres of land. Compensation was awarded for the part taken, but, the evidence showing that the residue of the tract would be enhanced in value by the construction and operation of the road, no consequential damages were allowed to the land-owner. The owner claimed that a strip of land next to the railroad was lessened in value by the proximity of the road. The constitutional provision in Illinois relating to the taking of property for public use is the same as our own, and the statute under which the assessment was made provided that benefits should not be set off against or deducted from compensation. The award was sustained on appeal, the court holding that "it was not the damages to a strip of land lying within a limited number of feet of the road-bed that the jury were required to assess, but the damages, if any, to the entire tract;" that the effect of the road upon a part of the tract was not to be considered, but upon the whole tract. "This," the court said, "is not deducting benefits or advantages from damages, but it is ascertaining whether there be damages or not." To the same

effect is the case of *Railroad Co. v. Wait*, 3 Or. 91. The statutes we have considered are founded upon the provision of the constitution forbidding the taking of private property for public purposes without just compensation. Their purpose was to do exact and equal justice among all citizens of the state, and to award to every one full and fair compensation for all property taken for public use, or injured by the erection of public improvements. The rule established by the courts, and prevailing under the General Railroad Law, accomplished in a broad and liberal manner that object. The meaning of the expression "just compensation" has not been limited to the value of property actually taken, but has been held to include all consequential injuries which the landowner may sustain by reason of depreciation of value in the residue of the property by reason of the taking of a part, and the construction thereon of the public improvement. This rule affords full indemnity to the property-owner, and leaves him in as good condition as he was before the construction of the road. And this is all that any citizen has a right to ask. If the rule which the court held in this case is to govern awards made against railroad companies when structures are erected in the public streets under public authority, when no land is taken, and the compensation is confined to injuries sustained by abutting property, the companies will be compelled, in many instances, to pay where no injury has been done, and parties will recover who have sustained no loss. Such a rule has not yet received judicial sanction.

The increase of value resulting from the growth of public improvements, the construction of railroads, and improved means of transit accrues to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the property-owner, and the railroad company is not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. But the special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations, are elements which enter largely into the inquiry whether there is injury or not; and the jury must consider them, and give to them due weight in their verdict. Between this rule and the statutory provision quoted there is no conflict. The property-owner will in every instance receive the "just compensation"

which the constitution secures to him for his property which is taken or injured by the railroad, and the corporation will be compelled to pay whenever damages result from the erection of their structures and the construction of the road. Our conclusion is that the defendant was entitled to the instruction requested, and the exception to its refusal was well taken. The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur; Follett, C. J., in result.

1. **Elevated railroads — right to damages.**— On the right to recover damages for an elevated railroad in a street reference is made to 1 Am. R. R. & Corp. Rep. 53, note, and cases there referred to and Lewis Em. Dom., § 123.

2. **Measure of damages**— The measure of damages in any case will depend upon the nature and purpose of the action or proceeding. In New York it is held that, in an ordinary action at law by an abutting owner, the recovery must be limited to the commencement of the suit and that successive actions may be brought until the company has acquired, by condemnation and payment of permanent compensation, the right to maintain the road. Tallman v. Metropolitan El. Ry. Co., post.

The parties, however, may by agreement or acquiescence sanction the recovery of permanent damages in a single action. Porter v. Metropolitan El. Ry. Co., 120 N. Y. 284. And see 1 Am. R. R. & Corp. Rep. 724, note.

As to the recovery of punitive damages in such an action see Powers v. Manhattan Ry. Co., post.

3. **Effect of the transfer of the property on the right of recovery**— Where the plaintiff was divested of her title to the property in question after the construction of the road, it was held no bar to her recovery for damages which had accrued prior to such divestiture. Porter v. Metropolitan El. Ry. Co., 120 N. Y. 284. Nor did it make any difference that this divestiture of title was accomplished by the foreclosure of a mortgage made prior to the construction of the road. Ibid. See, also, Chicago & Alton R. Co. v. Maher, 91 Ill. 312; Chicago, etc., R. Co. v. Loeb, 118 Ill. 203; Merchants' Union Barb. Wire Co. v. C., B. & Q. R. Co., 70 Iowa, 105; Lewis Em. Dom., §§ 818, 819, 824, 825.

TALLMAN V. METROPOLITAN EL. RY. CO.

(23 N. E. R. 1134; 121 N. Y. 119.)

1. **ELEVATED RAILROADS. REMEDY OF ABUTTING OWNERS.** Plaintiff owned four lots on Fifty-third street which he used for a carpenter shop and lumber yard. The defendant constructed an elevated railroad on the street, and this was a suit for damages. Held, that the plaintiff had his option to enjoin the

construction of the road until his compensation was adjusted by agreement or condemnation, or to bring successive actions at law for the damages suffered from time to time.

2. MEASURE OF DAMAGES. In an action at law the recovery would be limited to the diminution in the rental or usable value of the lots up to the commencement of the suit.

3. SPECULATIVE DAMAGES. Such diminution in usable value should be estimated with reference to the actual use of the premises, and not with reference to proposed uses which were not in fact made, and evidence as to plans of proposed houses, the cost of the same and the difference in the rental value thereof with and without the road is improper.

Edward S. Rapallo and Samuel Blythe Rogers for appellant.
James M. Smith for respondent.

EARL, J. The plaintiff was the owner of four adjoining lots on the westerly side of West Fifty-third street in the city of New York. He became the owner of three of them in 1866, and of the other in 1868, and he continued to own them until after the commencement of this action in February, 1884. The elevated railway of the defendants was constructed through Fifty-third street in front of these lots in 1878, and was thereafter maintained and operated. The plaintiff used a part of his lots for a carpenter shop and the remainder as a lumber yard. This action was commenced to recover damages occasioned to the lots by the construction and operation of the railway, and the only question which it is important for us now to determine relates to the rule of damages. When the defendant began to construct its railway in front of the plaintiff's lots he could have commenced an action in equity against it, and restrained it until it had made compensation to him for the rights and easements which it took from him, or until it acquired them by condemnation proceedings. *Story v. Railway Co.*, 90 N. Y. 122. In that way he would, at least in the theory of the law, have been indemnified for all the damages he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time he could have taken it at any time afterward during his ownership of the lots with the same result. He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed, and then bring successive actions to recover damages to his lots, caused by the construction, maintenance and operation of the railway. In such an action he would recover his damages to

the commencement of the action, and the action would be governed by the principles laid down in *Uline v. Railroad Co.*, 101 N. Y. 98; 4 N. E. Rep'r, 536. In such an action the plaintiff cannot recover for the permanent diminution in the value of his lots. He can only recover the damages he sustains from day to day, or from month to month, or from year to year, in the use of his lots; and the question to be determined in such an action is how much has the rental, or usable value, of the lots been diminished by the construction, maintenance and operation of the railway? As a basis for estimating the damages the lots must be taken as they are used during the time embraced in the action, and the plaintiff's recovery must be confined to the diminished rental or usable value of the lots just as they were. He was in no way prevented from putting his lots to any use he wished. He had the right acting reasonably, not wantonly or rashly, to put upon them any structures which he deemed most to his advantage; and at any and all times, until the railway company acquired as against him the right to maintain and operate its road in Fifty-third street, he had the right to recover the diminished rental value of his lots occasioned to them just as they were by the maintenance and operation of the road. But he could not be permitted to prove, or allowed to recover such damages as he might have sustained if he had put his lots to other uses, or placed upon them other structures. Such damages would be purely speculative and contingent. The plaintiff had owned these lots for about twelve years before the railway was constructed, without making any substantial improvements upon them, and they remained in the same condition down to the commencement of the action. It appears that at some time he made plans for the erection of dwelling-houses upon the lots; but whether he ever intended to build, or would have built, the houses is mere matter of conjecture. Upon the trial he was permitted to prove what it would have cost to erect the dwelling-houses upon the lots, and what they would have rented for after they were constructed, and also to give evidence of the amount for which they would have rented if the railroad had not been constructed; and the jury evidently took this evidence into consideration in fixing the amount of damages which they awarded the plaintiff. There can be no certainty that the plaintiff would ever have erected dwelling-houses upon the lots, and there could

be no certainty as to the rents which could have been obtained from them either with or without the railroad in the street, and the defendant was permitted by the rule adopted in the court below to have all the advantages which he could derive from keeping his lots substantially vacant and ready to sell as such, and at the same time to have all the advantages, without the investment of any money and without any risk, which he could have derived from their improved condition. He was simply entitled to the damages caused to him in the use of his lots from the defendant's interference with his easements of light, air and access; and such damages are necessarily, and from the very nature of the case, such only as flowed from the interference with such easements during the time covered by the action. If he desired a more ample indemnity for the injury he suffered from the railway in front of his lots he should, by an equitable action, have compelled the defendant, either by agreement with him to pay his damages, or to acquire the right by condemnation proceedings, to interfere with and take his easements. Any other rule would open upon the trial in every case like this an inquiry into all the possible uses to which the abutting owner might put his premises, and damages, instead of being awarded upon any certain or probable basis, would rest mainly upon conjecture and speculation. Adequate sanction for these views is found in the following authorities: *Greene v. Railroad Co.*, 12 Abb. N. C. 124; *Colrick v. Swinburne*, 105 N. Y. 503; 12 N. E. Rep'r, 427; *Wheelock v. Noonan*, 108 N. Y. 179; 15 N. E. Rep'r, 67; *Hatfield v. Railroad Co.*, 33 N. J. Law, 251; *Dorlan v. Railroad Co.*, 46 Penn. St. 520. The rule of damages, as thus laid down, was violated by many rulings upon the trial of this action, and a new trial must, therefore, be ordered, costs to abide the event.

All concur.

Elevated railroads — damages. — See *Newman v. Metropolitan El. R. Co.*, and note, ante; *Powers v. Metropolitan El. R. Co.*, post.

HARGIS v. KANSAS CITY, C. & S. RY. CO.

(18 S. W. R. 680; 100 Mo. 210.)

1. **EMINENT DOMAIN. PAROL GIFT OF RIGHT OF WAY. ESTOPPEL.** Where the owner of a quarter section of land makes a parol gift of a right of way across the same to a railroad company, which enters, stakes off a strip one hundred feet wide and constructs its road thereon, and continues to operate the same, it being authorized by law to acquire not exceeding one hundred feet for that purpose, both the owner and his grantees will be estopped to claim, not only the land actually occupied by the company, but also the entire strip of one hundred feet.

2. **WHEN WIDTH NOT SPECIFIED, ONE HUNDRED FEET WILL BE PRESUMED.** Although in a parol gift of a right of way no width is mentioned or specified, one hundred feet will be presumed as intended by the parties, that being the maximum allowed by law, and an entry and occupation by the company will be construed to extend to the whole hundred feet.

Wallace Pratt and *I. P. Dana* for appellant. *Bogges & Moore* for respondent.

RAY, C. J. This is an action of ejectment, in common form, brought in March, 1886, in the circuit court of Cass county. On its face the petition seeks to recover the described quarter section, but the answer of defendant disclaims all interest therein except as to the strip or right of way, of one hundred feet in width. As to this strip or right of way, defendant sets up and claims that, in 1870 or 1871, its predecessor in title entered, and located and constructed the railroad thereon, with the knowledge and consent and by agreement with the then owner of said land, and in accordance with said agreement appropriated for the right of way and railroad said strip of one hundred feet, being fifty feet on each side of the center line of said track, and that defendant, and those under whom it claims, have ever since continuously claimed and occupied the same for said purposes. The case was tried by the court, and plaintiff recovered judgment for thirty-seven and one-half feet on each side of a strip of twenty-five feet through the middle, on which the railroad track is actually located and constructed, and which, plaintiff concedes, defendant has the right to hold and enjoy. The real controversy, therefore, is as to the remaining seventy-five feet, being the two strips of thirty-seven and one-half feet each on each side of said twenty-five foot strip through the center of the one hundred foot strip or right of way.

Defendant admits that the plaintiff has the valid record title, by warranty deed, to the quarter section described in the petition; and plaintiff concedes that defendant is the legal successor to the St. Louis, Lawrence and Denver Railroad Company, which, about the year 1870, built its railroad and laid its track across said quarter section. At that time, in 1870 or 1871, one Browning was the owner and resided on this quarter section. It is conceded that before the said company entered upon the land, said Browning said he would give the right of way; that he was present while the engineers were locating the same, and subsequently declared that he had given the right of way. But plaintiff contends that this entry was under a mere license, and that the company did not occupy thereunder more than twenty-five feet, and, therefore, can claim to that extent, but no further. In other words, the position of plaintiff is that Browning, and those claiming under him, had and have the legal title to the whole quarter section, subject to the license given by Browning to the railroad company, and that they have the actual and constructive possession to all of it, except what the railroad company has in its actual possession; that is, the road-bed on which the track is actually laid.

The learned and able counsel for plaintiff has pointed out that a right of way, properly so called, is an easement — an interest in land of another — and ordinarily it can only be acquired by deed, or what is equivalent thereto, and that a parol license is insufficient for that purpose. So, too, he concedes that a parol license, when executed, operates by way of estoppel, and may ripen into title by prescription, but claims that the right or title thereunder extends in no case beyond the boundary of the executed license. The propriety, in general, of these views, may be conceded; but their application in given cases, such as the one now before us, may be, and often is, somewhat difficult. How far, for example, with respect to the possession, shall the license, regarding the transaction in question as of that character for the present, be deemed to have been executed? This may depend, we think, upon a variety of conditions and circumstances presented by particular cases. Obviously, in cases like the one now under consideration and review, the principal use of the strip of land given for the railroad will be to support the railroad track or tracks over which the trains will run from time to time. The expenditure of labor

and money which creates the equitable estoppel, if any is created at all, as against the land-owner and his grantees, is made upon that portion. But should the license, if such it is, be held to be executed only so far, and the right of possession taken thereunder be limited to the actual road-bed, in cases of this sort, where the facts are as in the record before us?

Perhaps a few citations from the evidence, which is undisputed in this behalf, will best show what actually took place, with reference to the strip in question, between the original land-owner and the original company making its entry thereon. A. C. Briant testified: "I was interested in having road built, and, with John Bartleson and some one else, was appointed a committee to get right of way. Bartleson and I went to Dr. Browning's house and talked with him about it, and he said he would give the right of way for the road." And on cross-examination: "John Bartleson and I, and some one else — I don't remember who — were on a committee to get right of way. We saw Dr. Browning between preliminary survey and permanent location of road. He said: 'I'll give the right of way.'" John C. Bartleson testified: "Through the company's attorney, Mr. Van Waggoner, of St. Louis, I was employed to assist in procuring the right of way for said railroad through the section of country in which I then lived, and, in company with Mr. Van Waggoner, went to George W. Browning, who had full control and possession of this Duncan farm, to secure right of way across same; and, in my presence and hearing, said Browning granted and pledged to Mr. Van Waggoner a right of way for said railroad across and through his said land, the Duncan farm. Mr. Browning granted this right of way freely, fully and without any reservation; and the railroad was constructed across his land without any opposition from him or any one else, he at that time residing on this farm, where he resided for a long time thereafter. He was, to my knowledge, a strong supporter of the railroad, and anxious for its construction." It is obvious upon this evidence that said Browning intended to give, and did verbally agree to donate, the right of way. As to the extent thereof, it appears, we think, that he intended and expected the same to be the usual width, of one hundred feet. For example, the witness A. C. Briant testifies, among other things, that the "railroad track was built across it about

1871. Was there when survey was made and when road was located, and know it was staked off. There was more than one line of stakes. I think there were three. There was a center line and two outside lines, which were, I think, one hundred feet apart. I never measured the distance, but judged from the looks. Browning was there when the road was staked off. There were eight or ten men locating it. They had usual instruments of railroad engineers. * * * Dr. Browning was there when the stakes were set." Bartleson says: "As I understood it, the right of way granted by Mr. Browning was of the usual width granted in that neighborhood to the railroad. I think the width of the right of way granted was a hundred feet. It was the full right of way — all that was asked by the railroad; but I would not state that there was any mention in that conversation of any specific width. To the best of my recollection, this right of way was granted in February or March, 1871, and it was granted by Mr. Browning at his place of residence on said Duncan farm." Jackson Farrell testifies: "Me and Dr. Browning had a contract to furnish ties to that road. We sold them for twenty-five cents a tie, and delivered them on the railroad. Dr. Browning lived about a quarter mile north on same quarter section where we delivered ties. Dr. Browning told me he had given the right of way for the railroad, and was glad it was being built, and that he would try and get a switch, and could then sell his timber. The doctor did not say to me what width he had given. He told me that he voted for the bonds to help the road."

This shows, we think, that said Browning was willing to give, and did verbally agree to give, what the railroad company was asking; that is, the usual right of way, or such as the corporation could acquire in proper condemnation proceedings. But, even if there was no specification or agreement as to the width of the right of way so given, then, in the absence of any thing to the contrary, we think the entry and occupation and construction of the railroad across the quarter section, under the said permission and verbal donation, is to be construed as an appropriation by the corporation to the extent the law authorized it to take land for right of way for railroad purposes. The company was not, it is true — and as is suggested by counsel — proceeding to condemn the land under the statute, which limits the amount taken to an amount

not exceeding one hundred feet. In such proceedings, under the statute, the company may, by the proper step, appropriate, at its option, less than one hundred feet; but, if the company fails to designate and limit the amount, it has been held that its entry and construction of the road must be regarded as an appropriation of the amount authorized by law. *Railroad Co. v. Cochran*, 3 Lea, 482; *Prather v. Telegraph Co.*, 89 Ind. 501; *Day v. Railroad Co.*, 20 Am. & Eng. R. Cas. 349. In some of the cases the corporations have sought to limit their liability to the amount actually occupied, but have been held to a liability for the amount provided by law, unless their intention to take less has been appropriately manifested. Suppose, for example, that the railroad in question had, without the license or leave of said Browning, but under circumstances otherwise similar, entered upon and constructed the railroad over this quarter section. Could it, we may ask, limit its liability to the twenty-five feet actually occupied by the road-bed, in an action for damages by the land-owner? Although the proceeding was not under the statute, yet we apprehend that for sake of certainty, if for no other reason, the rule of law as to width, as shown by the statute, should prevail, in the absence of a proper and definite showing on the part of the company of its intention to appropriate less. So, too, in this case, supposing there was no definite agreement as to width of the right of way, but an intention on the part of the land-owner to give the right of way, then we think the railroad company, in entering thereunder and building its road, at large expense, acquired the right of way of the extent authorized by law. The land-owner has not, in the case before us, manifested his intention to give less than the company could acquire under the statute, nor has the company sought to limit its appropriation to any less amount; and it seems to us that the only rule that would be fair and just to both parties, in most cases of this sort, so far as extent of appropriation is concerned, is the rule which the law provides. Authorities are abundant to this effect, and a number of them are cited in the briefs of counsel for defendant. In the case of *Campbell v. Railroad Co.*, 110 Ind. 490; 11 N. E. Rep'r, 482, to which we are referred, the company took possession with the license of the owner, whose grantee, after the construction of the railroad, sued the company in the action of ejectment.

The court say, in the course of its opinion: "When, therefore, it appeared that the appellee, with the leave and license of Joseph Campbell, under whom appellant claims title, had entered upon and taken possession of the strip of land described in the complaint herein, and upon the faith of such license had expended large sums of money in the construction and maintenance of its line of railroad thereon, it was properly held, we think, that appellee's right of way thus acquired, in the absence of any limitation thereon appearing to the contrary, extended to the full statutory width of six rods or one hundred feet." If, then, the original land-owner, Browning, intended to give the whole one hundred feet, and did so orally, as we think the evidence indicates, and the original corporation, as he knew, intended to and did appropriate that amount, as shown by its surveys and locations, and went into possession thereof claiming one hundred feet, and thereafter constructed, without objection, the railroad thereon, with said expenditures of money and labor, in reliance upon said oral agreement, why, we may ask, if the equitable estoppel arises as to any part of the strip, does it not also arise and extend to the whole? It is, we think, clear that said Browning himself could not subsequently repudiate the transaction in whole or in part. Nor did he ever seek so to do, though he continued to reside on said quarter section for some years thereafter, until his death.

So far as plaintiff is concerned, the evidence shows, we think, that he purchased with knowledge of the defendant's claim upon the whole strip, or under such conditions and circumstances as subjects him to the equities which existed as between the original parties. He testifies as follows: "I first knew the quarter section about 1875, and Dr. Browning was then living on it; and the railroad then ran across it, and has ever since. I first owned the quarter section in 1880. Bought it in September of that year, of Mr. Selecman, and sold it next year to Mr. Barnett; and he sold it to Gill, to whom I made the deed in 1881. Did not own it again until July, 1883, when I bought it from B. F. Hargis, and have owned it since. J. E. George is now in possession, and has been for some time. I traded it to him for some land in Jackson county on condition that, after this suit is settled, he shall have all except fifty feet on each side of the railroad; but no deeds have passed yet. Knew the railroad ran across the quarter when I

bought it." It also appears from plaintiff's own testimony, that, when he purchased the land, there was a section-house, built by the company, extending, as plaintiff himself says, over fifty feet, and as far out to the south as the claim of the right of way. Other evidence shows that the section-house had been built as early as 1872, and had been occupied thereafter by the employes, and was there at the date of plaintiff's purchase. With knowledge of this sort as to the possession by the railroad or railroads, the plaintiff is, we think, chargeable, under the law, with actual notice or means of knowledge, of the defendant's claim. If he did not in fact know he could and should have inquired as to the extent of the defendant's claim of title. Plaintiff was chargeable with the knowledge that, under the law, the corporation could take to the extent of one hundred feet. He bought the quarter section subject to the donation made by said Browning, his predecessor in title, to the railroad company, and was aware of its possession, as above stated; and this, we think, is sufficient to estop him from claiming as an innocent purchaser for value.

As before stated, the evidence, we think, shows the original corporation was put in possession of the right of way, consisting of one hundred feet, by the said owner of the land at that time, and that the entry of said corporation was with color and claim of title to said extent and width. Said original corporation and successor remained in the actual and exclusive and continuous possession of the twenty-five feet, at least under color and claim of title to the whole strip, exercising in all that time such usual acts of ownership as the nature of the property permitted. This is, we think, a possession of the whole strip, and gives defendant title under the statute of limitations.

A number of other questions are suggested and discussed in briefs of counsel, but their consideration is unnecessary to the proper disposition of the case, and need not be further noticed. For the reasons hereinbefore stated, the judgment of the circuit court is reversed, in which all the judges concur.

1. *Indefinite grant of right of way.*— "Where a right of way or other easement is granted by deed without fixed and definite limits, the practical location and use of such way or easement by the grantee under his deed acquiesced in by the grantor, operate as an assignment of the right and are deemed to be that which was intended to be conveyed by the deed and are the same in legal

effect as if the location so selected and used had been fully described by the terms of the grant. And when an indefinite grant of that sort has been once located and defined by actual use, no enlargement or extension of the right can afterward be made by the grantee, though such enlargement or extension might have been included in the original location." *Lewis Em. Dom.*, § 290; *Bannon v. Angier*, 2 Allen, 128; *Onthank v. Lake Shore & M. S. R. Co.*, 71 N. Y. 194; *Warner v. R. Co.*, 39 Ohio St. 70.

2. *Oral gift of right of way.*—Transactions between an owner of land and a railroad company in reference to a right of way are to be viewed in the same light as similar transactions between individuals. An interest in land cannot be transferred by parol, and a mere consent or permission to use land for any purpose for which it might be condemned does not confer a permanent right or interest in the land and may be revoked at any time. *Baltimore, etc., R. Co. v. Algin*, 63 Md. 319; *Eggleston v. New York, etc., R. Co.*, 35 Barb. 162; *Miller v. Auburn, etc., R. Co.*, 6 Hill, 61; *Murdock v. Prospect Park, etc., R. Co.*, 73 N. Y. 579; *Mumford v. Whitney*, 15 Wend. 380; *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 634; *Blaisdell v. Portsmouth, etc., R. Co.*, 51 N. H. 483; *Hatfield v. Central R. Co.*, 29 N. J. L. 571; *Kivett v. McKeithan*, 90 N. C. 106; *Bridges v. Purcell*, 1 Dev. & B. 492; *Stevens v. Stevens*, 11 Met. 251; *Ruggles v. Lesun*, 24 Pick. 187; *Seymour v. Carter*, 2 Met. 520; *Fitch v. Seymour*, 9 Met. 462; *Smith v. Goulding*, 6 Cush. 154; *Craig v. Lewis*, 110 Mass. 377; *Foote v. New Haven, etc., R. Co.*, 23 Conn. 214; *Morrill v. Mackman*, 24 Mich. 279; *Woodward v. Seely*, 11 Ill. 157; *Clute v. Carr*, 20 Wis. 581; *Parry v. Richmond*, 27 Ind. 66; *Cape Girardeau, etc., Road Co. v. Renfro*, 58 Mo., 265; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 458. But see *Currie v. Natchez, etc., R. Co.*, 61 Miss. 725; *S. C.*, 62 Miss. 506; *Provolt v. Chicago, etc., R. Co.*, 57 Mo., 256; *Baker v. Chicago, etc., R. Co.*, 57 Mo. 265; *Hosher & Kansas City, etc., R. Co.*, 60 Mo. 329; *Kanaga v. St. Louis, etc., R. Co.*, 76 Mo. 207; *Campbell v. Indianapolis, etc., R. Co.*, 110 Ind. 490; *Woodbury v. Parshley*, 7 N. H. 237; *Renick v. Kern*, 14 S. & R. 267; *Thompson v. McElarney*, 82 Penn. St. 174.

A parol agreement to donate a right of way to a railroad company in consideration of the road being constructed over one's land or for any valuable consideration, though void in law, may be enforced in equity after performance by the railroad company. *Trenton Water-Power Co. v. Chambers*, 9 N. J. Eq. 471; *Raritan Water-Power Co. v. Veghte*, 21 N. J. Eq. 463; *Paterson, etc., R. Co., v. Kamlah*, 42 N. J. Eq. 93; *Baltimore, etc., R. Co. v. Algin*, 63 Md. 319.

BULLOCK V. WILMINGTON & W. R. Co.

(10 S. E. R. 983; 105 N. C. 180.)

1. *RAILROAD COMPANIES. ACCIDENT AT CROSSING.* The plaintiff's team, loaded with a portable engine and boiler, became stalled on a crossing over the defendant's road and was run into by a train and damaged. Held, that whether plaintiff was guilty of negligence or not in being on the crossing at the time,

it was the duty of the defendant's servants in charge of the train, as soon as they discovered or had reason to believe that the team was stalled, to use every means to stop the train and prevent a collision, and that if they failed to exercise ordinary care in that behalf, the defendant was liable. A judgment for the plaintiff was affirmed.

2. DUTY TO AVOID INJURY TO ONE WRONGFULLY ON TRACK. "Even if the plaintiff did not exercise due caution in venturing upon the track under all the circumstances, still the defendant was liable to answer in damages for the injury sustained, if, by the exercise of ordinary care on its part, it might have been prevented."

THIS was a civil action tried at the fall term, 1889, of the superior court of Edgecombe county, before Boykin, J. The plaintiff in his first cause of action complained and alleged that he was the owner of a portable steam-engine and boiler, which he was attempting to have drawn across defendant's track by two teams of oxen, when defendant's servants negligently ran an engine and train over said portable engine and boiler. In the second cause of action he alleged that it was the duty of the defendant to keep up a certain crossing over its track, and defendant neglected to do so, in consequence of which said engine and boiler was injured in the attempt to transport them over said road at said crossing. The defendant denied generally each allegation of the first cause of action, except the allegation as to the existence of the corporation, and set up contributory negligence. In answer to the second cause of action, the defendant admitted the obligation to keep the crossing in repair, denied negligence, and charged contributory negligence. The issues and findings were as follows: "(1) Was the steam-engine and boiler mentioned in the complaint injured by the negligence of the defendant? Answer. Yes. (2) What damage has the plaintiff sustained? A. \$600."

John L. Bridgers for appellant. *Gilliam & Son* for appellee.

AVERY, J. When a person in charge of a wagon and team approaches a public crossing, at which he proposes to pass over a railway track, it is his duty, even though no train is expected at that hour, to look and listen, and take every precaution that prudence would suggest, to avoid a collision. Wood Ry. Law, 1302. According to the undisputed testimony, the witness, who was in charge of the wagon, went upon the track in person, without venturing with the team, and, looking in the direction from which

the train that injured the engine subsequently came, saw the line clear for more than a thousand yards to a curve (which was in fact afterward ascertained by measurement to be one thousand and seventy yards distant from the crossing). The defendant company contends, not without reason, that if, in the view of the testimony most unfavorable to the plaintiff, his negligence did contribute or might have contributed concurrently with that of the defendant to cause the injury, the court should have given the jury such specific instruction, as was necessary to apply the law to that particular phase of the testimony, if requested to do so by the counsel of the company. This principle, it is insisted, can be applied, if we suppose—considering some portions of the testimony offered on both sides to be true—that the plaintiff's agent, after seeing that there was no train as near as the curve, drove his team upon the crossing without looking at his watch, when a glance at it would have notified him that it was about the time when the train usually passed, and when he knew, or by examination might have ascertained, the condition of the crossing, and especially that, in order to draw the wagon containing the engine across the track, the wheels must overcome a perpendicular rise of nine inches. The company admits in its answer the duty of keeping the crossing in good condition, and upon the hypothesis, which we are now assuming to be true, was guilty of negligence in failing to repair it. *Wood Ry. Law*, § 420; *Gray v. Railroad Co.*, 37 Iowa, 121. The defendant company will not be allowed to excuse the negligent running of its trains, if its engineer was shown to be in fault in destroying an engine detained on the crossing on account of its own omission to make the public highway passable. The plaintiff's agent was not wanting in ordinary care, because he did not inspect the crossing to see whether the company had discharged its duty before venturing upon it, nor is the single circumstance that he failed to look at his watch sufficient to show culpable imprudence, because he could have passed over safely, if the crossing had been in good condition. Where a traveler crossed a bridge that he actually knew to be somewhat unsafe, but which the county officers had not closed or warned people not to pass, it was held by the supreme court of Pennsylvania that he was not in fault, and could recover for injuries sustained thereby. *Humphreys v. Armstrong*, 56 Penn.

St. 204; *Alger v. Lowell*, 3 Allen, 402; *Robinson v. Pioche*, 5 Cal. 460.

Wood, in his work on Railway Law (§ 323, p. 1314), says: "If a person in crossing a railroad track, in the exercise of due care as to approaching trains, through no fault of his, gets the wheels of his vehicle caught in the track, so that he cannot extricate them in season to avoid injury from an approaching train, he is not chargeable with such negligence as will preclude a recovery for injury to his team, if he properly endeavors to cause the train to be stopped." *Railroad Co. v. Dunn*, 56 Penn. St. 280; *Railroad Co. v. Hunter*, 11 Wis. 160. The engineer testifies that he saw Harper running up the track waving his handkerchief as soon as he turned the curve (one thousand and seventy yards from the crossing), and the fireman states that he called his attention to the obstruction six hundred yards from the crossing. This is in accord with Harper's statement, that he ran up the road, making the signal to stop, as soon as he discerned that the team was stalled. Instead of leaving the question of contributory negligence to the jury at all, his honor might have told them that the plaintiff had not, in any aspect of the evidence, contributed by his own want of care to cause the injury sustained. As the erroneous instruction was favorable to the defendant, we need not analyze or discuss so much of the charge as relates to contributory negligence. There may be mutual negligence, and still one party may maintain an action against the other. When a man negligently lies down and falls asleep in the middle of a public road, and another, who sees him, failing to exercise ordinary care, drives over and injures him, an action will lie for the injury. *Kerwhacker v. Railroad Co.*, 3 Ohio St. 172; *Davies v. Mann*, 10 Mees. & W. 545. It is upon this principle that his honor acted in instructing the jury. And authorities fully sustained him in the position that, even if the plaintiff did not exercise due caution in venturing upon the track under all the circumstances, still the defendant was liable to answer in damages for the injury sustained, if by the exercise of ordinary care on its part it might have been prevented. *Gunter v. Wicker*, 85 N. C. 310; *Troy v. Railroad Co.*, 99 N. C. 298; 6 N. E. Rep'r, 77; *Farmer v. Railroad Co.*, 88 N. C. 564; *Shear. & R. Neg.*, § 36; *Cooley Torts*, 679; *Blaine v. Railroad Co.*, 9 W. Va. 252; *Railroad Co. v. State*, 33 Md. 542.

It is the duty of an engineer, when running his engine, to keep a constant "lookout for obstructions; and when an obstruction is discovered, no matter when or where, he should promptly resort to all means within his power, known to skillful engine-drivers, to avert the threatened injury or danger." Wood Ry. Law, § 417, p. 1548; Railroad Co. v. Williams, 65 Ala. 74; Same v. Jones, 56 Ala. 507. If the engineer, so soon as he discovered that the wagon was detained upon the track and could not for the time get out of the way, or so soon as with proper care and watchfulness he would have had reason to think such was its condition, had used every means and appliance in his power to stop the train, the defendant would not have been liable. But the judge omitted to tell the jury that it was negligence on the part of the defendant, if the engineer could have seen by watchfulness, though he did not in fact see, the road was obstructed in time to stop his train before reaching the crossing. Carlton v. Railroad Co., 104 N. C. 365; Wilson v. Railroad Co., 90 N. C. 69; Snowden v. Railroad Co., 95 N. C. 93. The defendant could not complain of this error. It is true that ordinarily an engineer has a right to assume that one who has time will get out of the way, but he is not warranted in acting upon this assumption after he "has reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals." Frech v. Railroad Co., 39 Md. 574. Counsel for the defendant in his brief states that there was testimony tending to show that the curve was only two hundred yards from the crossing; but we cannot look beyond the case on appeal, and there it appears that the witnesses estimated the distance at from six hundred to one thousand two hundred yards, two swearing that they measured, and one that he stepped, it, and made it over one thousand yards. The engineer testified that he did not know whether it was one thousand two hundred or two hundred yards. That was no evidence that the distance did not exceed the shorter distance mentioned by him. The engineer testified that he saw the obstruction on the track as soon as he turned the curve, and at the same time saw the man running up the track making the signal, and that he could have stopped his engine by the use of the appliances at his command within three hundred and fifty yards. It would seem that he had sufficient reason to believe that those in charge of the team had encountered some difficulty when he

saw it on the track, and the witness, Harper, running and waving his handkerchief. But, if that were not so, the fireman testified that he called the attention of the engineer to the obstruction, when he was six hundred yards from the wagon, and when, according to his own estimate, he might have stopped his train two hundred and fifty yards short of the crossing. But he went on, according to his own testimony, within some three hundred or three hundred and fifty yards, but, as the result proved, too far to save the plaintiff harmless. Applying the law to this state of facts, it would seem that the plaintiff might have complained of his honor's charge as to the liability of the defendant by reason of his own negligence; but, like the instruction relating to contributory negligence, in was more than fair to the defendant. The defendant company has failed to point out any error that entitles it to a new trial. There is no error.

Affirmed.

Accidents at crossings — brief reference to recent decisions.— Whether case should go to the jury on the facts. *State v. Union R. Co.* (Md.), 18 Atl. Rep'r, 1081; *McNeal v. Pittsburgh, etc., R. Co.* (Penn.), 18 Atl. Rep'r, 1026; *Gebhard v. Detroit, etc., R. Co.* (Mich.), 44 N.W. Rep'r, 1045; *Breckenfelder v. Lake Shore, etc., R. Co.* (Mich.), 44 N.W. Rep'r, 957; *Pennsylvania R. Co. v. Wilson* (Penn.), 18 Atl. Rep'r, 1087; *Butler v. Gettysburg, etc., R. Co.* (Penn.), 19 Atl. Rep'r, 37; *Ivey v. Pennsylvania R. Co.* (Penn.), 19 Atl. Rep'r, 341; *Union R. Co. v. State* (Md.), 19 Atl. Rep'r, 449; *Menard v. Boston & Me. R. Co.* (Mass.), 23 N.E. Rep'r, 214; *Donnelly v. Boston & Me. R. Co.* (Mass.), 24 N.E. Rep'r, 38; *Underhill v. Chicago, etc., R. Co.* (Mich.), 45 N.W. Rep'r, 508; *Lee v. Chicago, etc., R. Co.* (Ia.), 45 N.W. Rep'r, 739; *Guta v. Lake Shore, etc., R. Co.* (Mich.), 45 N.W. Rep'r, 821; *Deisen v. Chicago, etc., R. Co.* (Minn.), 45 N.W. Rep'r, 864; *Daily v. Richmond, etc., R. Co.* (N.C.), 11 S.E. Rep'r, 320; *Lay v. Richmond, etc., R. Co.* (N.C.), 11 S.E. Rep'r, 412; *Gulf, etc., R. Co. v. Anderson* (Tex.), 13 S.W. Rep'r, 196.

Failure to ring bell or blow whistle. *Gulf, etc., Ry. Co. v. Breitling* (Tex.), 12 S.W. Rep'r, 1121; *Atchison, etc., R. Co. v. Morgan* (Kan.), 23 Pac. Rep'r, 995; *McBride v. Northern Pac. R. Co.* (Ore.), 23 Pac. Rep'r, 814; *Menard v. Boston, etc., R. Co.* (Mass.), 23 N.E. Rep'r, 214; *Lee v. Chicago, etc., R. Co.* (Ia.), 45 N.W. Rep'r, 739; *Gulf, etc., R. Co. v. Anderson* (Tex.), 13 S.W. Rep'r, 196; *International, etc., R. Co. v. Dyer* (Tex.), 13 S.W. Rep'r, 376; *Murray v. Missouri Pac. Ry. Co.* (Mo.), 13 S.W. Rep'r, 817.

Running at greater speed than that allowed by law or ordinance. *Gulf, etc., Ry. Co. v. Breitling* (Tex.), 12 S.W. Rep'r, 1121.

Duty to look and listen. *McBride v. Northern Pac. R. Co.* (Ore.), 23 Pac. Rep'r, 814; *Breckenfelder v. Lake Shore, etc., R. Co.* (Mich.), 44 N.W. Rep'r, 957; *Butler v. Gettysburg, etc., R. Co.* (Penn.), 19 Atl. Rep'r, 37; *Union R. Co. v. State* (Md.), 19 Atl. Rep'r, 449; *Brickell v. New York Cent., etc., R. Co.*

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(N. Y.), 24 N. E. Rep'r, 449; Chicago, etc., R. Co. v. Wilson (Ill.), 24 N. E. Rep'r, 555; Guta v. Lake Shore, etc., R. Co. (Mich.), 45 N. W. Rep'r, 821.

Contributory negligence. Breckenfelder v. Lake Shore, etc., R. Co., (Mich.), 44 N. W. Rep'r, 957; Gebhard v. Detroit, etc., R. Co. (Mich.), 44 N. W. Rep'r, 1045; McNeal v. Pittsburgh, etc., R. Co. (Penn.), 18 Atl. Rep'r, 1026; State v. Union R. Co. (Md.), 18 Atl. Rep'r, 1081; Pennsylvania R. Co. v. Wilson (Penn.), 18 Atl. Rep'r, 1087; Allen v. Maine Central R. Co. (Me.), 19 Atl. Rep'r, 105; Ivey v. Pennsylvania R. Co. (Penn.), 19 Atl. Rep'r, 341; Chicago, etc., R. Co. v. Halsey (Ill.), 23 N. E. Rep'r, 1028; Donnelly v. Boston & Maine R. Co. (Mass.), 24 N. E. Rep'r, 38; Brickell v. New York Central, etc., R. Co. (N. Y.), 24 N. E. Rep'r, 449; Chicago, etc., R. Co. v. Wilson (Ill.), 24 N. E. Rep'r, 555; Underhill v. Chicago, etc., R. Co. (Mich.), 45 N. W. Rep'r, 508; Lee v. Chicago, etc., R. Co. (Iowa), 45 N. W. Rep'r, 789; Guta v. Lake Shore, etc., R. Co. (Mich.), 45 N. W. Rep'r, 821; Daily v. Richmond, etc., R. Co. (N. C.), 11 S. E. Rep'r, 320; Lay v. Richmond, etc., R. Co. (N. C.), 11 S. E. Rep'r, 412; Murray v. Missouri Pacific R. Co. (Mo.), 18 S. W. Rep'r, 817.

Idiots and persons bereft of sight or hearing crossing tracks. Daily v. Richmond, etc., R. Co., 11 S. E. Rep'r, 320; International, etc., R. Co. v. Garcia (Tex.), 18 S. W. Rep'r, 223.

Negligence of watchman. Union R. Co. v. State (Md.), 19 Atl. Rep'r, 449; International, etc., R. Co. v. Dyer (Tex.), 18 S. W. Rep'r, 876.

Failure to have a flagman at a public crossing, where one is required by ordinance, is negligence *per se*. Murray v. Missouri Pac. R. Co. (Mo.), 18 S. W. Rep'r, 817.

Exemplary damages. St. Louis, etc., R. Co. v. Hall (Ark.), 18 S. W. Rep'r, 138.

TEXAS LAND & MORTGAGE CO., LIMITED, v. WORSHAM ET AL.

(18 S. W. R. 384; 76 Tex. 556.)

1. FOREIGN CORPORATIONS. VALIDITY OF STATUTE AS TO PERMIT TO DO BUSINESS AND REMOVAL OF SUITS TO UNITED STATES COURT. A statute of Texas forbid foreign corporations doing business in the state until they had obtained a permit to do so from the secretary of state and had stipulated that such permit should be subject to all the provisions of the act, one of which was if any such corporation should remove any suit to the United States court, it should forfeit its permit. Held, that the statute was contrary to the constitution of the United States and void.

2. Such statute, if not void, would not close the courts of the state to a foreign corporation with respect to rights acquired prior to the taking effect of the act.

Harwood & Harwood and *Thomas McNeal* for appellants.
Burges & Dibrell for appellees.

HENRY, J. The appellant is a corporation organized under the laws of the kingdom of Great Britain and Ireland. In the year 1886 it made a loan of money, and to secure it took a mortgage on the land in controversy in this suit. Subsequently it bought the land under the mortgage. In September, 1888, appellee procured to be issued an order of sale that was adverse to appellant's claim of title, and under it had caused to be advertised a sale of the land to take place on the first Tuesday in December, 1888. On the 29th day of November, 1888, appellant brought this suit to enjoin said sale. Among other defenses, the defendant especially excepted to the petition because it failed to show "that plaintiff is a person entitled to sue in the courts of this state, and does not show that plaintiff, if a corporation under the laws of a foreign state, has complied with the laws of Texas, so as to entitle it to do business in this state, and because plaintiff, if it had not done so, cannot legally do business in this state, and has no standing in the courts of Texas." The defendant also filed a general demurrer. The court first sustained the above special exception, and overruled the general demurrer. Afterward when the plaintiff proposed to introduce its evidence to prove its cause of action, the court required it to first produce and read in evidence its permit from the state to transact business under the act of the legislature passed on the 2d day of April, 1887, which plaintiff failed to do, whereupon the court set aside its judgment overruling the general demurrer, sustained the demurrer, and dismissed the cause. The correctness of this ruling is the only question presented by the record for our decision.

The first section of the act referred to requires any foreign corporation, desiring to transact business in this state, on or after January 1, 1888, to file with the secretary of state "a certified copy of its articles of incorporation, duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state, said application to contain a stipulation that said permit shall be subject to each of the provisions of this act. And thereupon the secretary of state shall issue to such corporation a permit for the general

transaction of the business of such corporation, and upon the receipt of such permit such corporation shall be permitted and authorized to carry on its business in this state." The second section directs that no foreign corporation which has not in good faith complied with the provisions of this act, and taken out a permit, shall hereafter be authorized to exercise any of the rights and privileges conferred upon corporations until it has complied herewith and taken out such permit. The third section provides that "any foreign corporation sued or impleaded in any of the courts of this state, upon any contract made or executed in this state, or to be performed in this state, or for any act of omission, public or private, arising, originating, or happening in the state, which shall remove any such cause from such state court into any of the federal courts held or sitting in this state, for the cause that such corporation is a non-resident of this state, or a resident of another state from that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or granted to such corporation to transact business in this state." The above statute is substantially, almost literally, the same as one previously enacted in the state of Iowa, and passed upon by the supreme court of the United States in the case of *Barron v. Burnside*, 121 U. S. 186; 7 Sup. Ct. Rep'r, 931. The court said: "As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void." That case does not decide, nor do we, that a state may not require foreign corporations to obtain permits to transact their business within the state. As is said in the opinion in the case cited: "The filing of the articles of incorporation, and the provision in regard to service of process, are to be authorized by the same resolution which requests the issue of the permit, and this request or application is to contain the stipulation above mentioned. These various things are not separable. They are all indissolubly bound up with the application for a permit, which is to be subject to every provision of the act. The permit cannot be issued unless such a stipulation is given, and the corporation is not to be permitted to carry on its business in the state unless the permit is issued to it and received by it." We see no

ground for questioning the correctness of the conclusions here announced. Even if there existed no question about the constitutionality of the statute, we do not think it should be given the construction attached to it by the ruling of the court. We do not think that the failure of the corporation to procure a permit, even if such failure had the effect of preventing it from further prosecuting its business in this state, should have the further effect of closing the courts of the state to it, so as to preclude it from asserting rights and recovering property already acquired. The judgment is reversed, and the cause is remanded.

A state cannot require foreign corporations to stipulate not to resort to the federal courts.—*Barron v. Burnside*, 121 U. S. 186; *Doyle v. Continental Insurance Co.*, 94 U. S. 535; *Home Ins. Co. v. Morse*, 20 Wall. 445.

ASH V. BALTIMORE & OHIO R. Co.

(19 Atl. R. 643; — Md. —.)

1. DEATH BY WRONGFUL ACT. ACTION UPON STATUTE OF ANOTHER STATE. An action cannot be maintained in Maryland to recover damages pursuant to a statute of West Virginia for wrongfully causing the death of a person in the latter state.

Albert Constable for appellant. *John S. Wirt* for appellee.

ALVEY, C. J. This action was brought by the plaintiff, the present appellant, as administratrix of Cecil T. Weaver, deceased, against the defendant company, to recover damages for the alleged killing of the intestate by means of the negligent and improper structure of one of the bridges on the road of the defendant in the state of West Virginia. Weaver, the deceased, was a citizen of Maryland, and at the time of his death, in June, 1888, was employed as a postal clerk in the service of the post-office department of the United States. His route, by the defendant's railroad, was between Baltimore, in Maryland, and Grafton, in West Virginia. At the time of the accident the train was bound east from Grafton; and it is supposed, though there was no witness to the fact, that the deceased, while performing his duty in taking in a mail pouch hanging from a crane, came to his death by having the back of his head brought violently in contact with

one of the timbers of the railroad bridge over Great Cacapon creek, in West Virginia. Death was instantly produced; but whether from the negligent act of the deceased, or solely from the negligent and improper structure of the bridge, was a question of fact, which, upon the evidence, it is unnecessary for us to express any opinion.

The action is not founded upon the statute of this state, which gives the right of action whenever the death of a person shall be caused by the wrongful act, neglect or default of another, for the benefit of the wife, husband, parent or child of the person whose death shall have been so caused, to be brought in the name of the state, for the use of the persons so entitled (Code, art. 67); but it is founded on the statute of West Virginia, which in many respects is essentially different from the provisions of our statute. The West Virginia statute (Code W. Va. p. 709, § 6) is set out in the declaration, and it was read in evidence, and is inserted in the bill of exception. That statute, after providing that damages may be recovered for the death of any person caused by the wrongful act, neglect or default of another, proceeds to provide that "every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided that every such action shall be commenced within two years after the death of such deceased person." By our statute the limitation to the right of action is confined to one year, and there is no restriction as to the amount of recovery. At the close of the evidence introduced on the part of the plaintiff, the defendant offered a prayer for instruction to the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and that prayer was granted; and whether that instruction was right or wrong is the only question presented on this appeal.

The plaintiff was bound to show, both by pleadings and proof, that she had a right, upon the law and the facts, to maintain the

action ; and, as this is a special action founded exclusively upon the statute of a neighboring state, the only principle upon which it can be sustained in the courts of this state is that of comity ; and, if it be not sustainable upon that ground, there was clearly no error committed by the court below in withdrawing the case from the jury. There is no pretense that this action is maintainable at the common law, or upon common-law principles. It is a special action given by a statute which has no inherent authority or binding force beyond the limits of the state which enacted it. We suppose it to be quite clear if, instead of founding this action upon the statute of West Virginia, it had been instituted and attempted to be maintained upon and by virtue of the statute of this state, to the provisions of which we have referred — the statutes of the two states being essentially dissimilar in their provisions — the action could not have been sustained, unless we were to attempt to give extra-territorial force to our statute, and to make it apply to acts and transactions occurring in other states ; and, if our statute cannot be so extended and applied, there can be no reason why statutes of other states, not similar in provisions to our own, though belonging to the same general class of legislation, should be allowed extra-territorial force and operation by the courts of this state. By the statute of West Virginia the right of action accrues to the personal representative of the deceased, the executor or administrator, and the damages, limited in amount, and hence in the nature of a penalty, are directed “to be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate,” whether such parties be wife or children or collateral relations of the deceased, whereas, by our statute the right of action is given directly to the parties who suffer damage by the death of the deceased, namely, the wife, husband, parent or child, and which action is to be prosecuted in the name of the state, for the use of the persons entitled ; and the jury are required to apportion the damages assessed.

An administrator or executor appointed in this state receives his power and authority to sue and maintain actions from the laws of this state, and from this state alone. It is according to the laws of this state that he must not conduct his administration and make distribution. There is no statute of this state,

nor any principle of law known to our courts, whereby an administrator or executor is given the right to sue and recover in an action like the present, nor' is there any law of distribution in force in this state that entitles the next of kin or distributees of a decedent's estate to receive the money recovered in an action like the present; and, if the present administratrix were allowed to maintain the action, it would be exclusively by virtue of a foreign law, and it would only be by force of that law that she could be compelled to account for and to make distribution of the money recovered. There is certainly no comity that requires one state to apply and administer the statute law of another in a case such as the present.

In *Rorer on Interstate Law*, 144, 145, upon review of the authorities, the author states his conclusion to be that in all purely personal actions, of a transitory nature, for torts at common law, a citizen of a state may sue a citizen of another state in the courts of such other state, or of any state wherein he may reside, or may be found and served with process, without regard to the place or state in which the injury may have been inflicted, but that where certain acts are made wrongs by statute which were not such theretofore, or where remedies additional to those which existed at common law are provided by statute, advantage can be taken of these new and additional remedies only within the territory or locality in which the statute has force. These constitute new rights, so to speak, and depend for their enforcement, always, upon the statutes by which they are created; and such statutes will be enforced only by the courts of the state wherein they are exacted. In support of these propositions many well-considered cases may be cited, as those of *Woodard v. Railroad Co.*, 10 Ohio St. 121; *Richardson v. Railroad Co.*, 98 Mass. 85; *Taylor's Adm'r v. Pennsylvania Co.*, 78 Ky. 348; *McCarthy v. Railroad Co.*, 18 Kans. 46; *Willis v. Railroad Co.*, 61 Tex. 432; *Buckles v. Ellers*, 72 Ind. 220. In the case of *Taylor's Adm'r v. Pennsylvania Co.*, just referred to, where it was held that an administrator appointed and suing in Kentucky could not maintain an action for the death of his intestate by negligence in Indiana, such action being maintainable by an administrator under the Indiana statute, but not under that of Kentucky, the court of appeals of the latter state said: "A personal representative, as

such, has no rights or powers beyond the jurisdiction of the government under whose laws he received his appointment, and *a priori* he cannot have any rights, nor be subject to any obligations or duties, not imposed by the law of his official domicile. He cannot carry his official character abroad, nor can his official powers and duties at home be affected by foreign laws. A Kentucky administrator suing in a Kentucky court must be able to show that the laws of Kentucky entitle him to the thing sued for. He cannot receive his office from one jurisdiction, and appeal to the law of another jurisdiction for rights or powers not given by the laws which created him." And the same principle is fully sustained in a well-reasoned opinion by the supreme court of Ohio in *Woodard v. Railroad Co.*, *supra*.

We are aware that there is some diversity of opinion upon this subject; but we are not aware that there is any well-considered case that holds that the action may be maintained, in a state other than that in which the accident occurred, on the same state of facts, as here presented, and where there existed in the statutes of the two states upon this subject such dissimilarity of provisions as we find to exist in the statutes of West Virginia and Maryland. In *Leonard v. Navigation Co.*, 84 N. Y. 48, it was held that an administrator appointed in the state of New York might maintain an action for the death of his intestate occasioned by a negligent injury inflicted by the defendant in another state, having a statute substantially like the New York statute, allowing an action of damages for death by negligence to be prosecuted by the personal representative of the deceased; and in the case of *Dennick v. Railroad Co.*, 103 U. S. 11, brought up from a circuit court sitting in New York, the same rule of decision is maintained as that laid down in *Leonard v. Navigation Co.*, *supra*. This case in 103 U. S. 11, is much relied on by the plaintiff, but the facts of that case are not similar to the facts of the present case. In that case the death occurred in New Jersey, and the action was brought by an administratrix appointed in New York; and in delivering the opinion the supreme court said "that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and [that] an administrator appointed under the law of that state would be held to have recovered to the same

uses, and subject to the remedies, in her fiduciary character, which both statutes require." The court also said that "the questions growing out of these statutes are new, and many of them unsettled. Each state court will construe its own statute on the subject, and differences are to be expected." It is clear, therefore, that the decision in the case reported in 103 U. S. does not apply in this case. But even the qualified decisions of the court of appeals of New York and of the supreme court of the United States upon this subject have not met with general approval, and have not been generally followed by subsequent state court decisions. In the recent case of *Davis v. Railroad Co.*, 143 Mass. 301; 9 N. E. Rep'r, 815, it was held by the supreme court of Massachusetts that an action by an administrator could not be maintained in that state for the death of a person caused by the negligence of the defendant in another state, the remedies provided in the two states not being alike, and the court expressly declined to depart from its own previous decision in *Richardson v. Railroad Co.*, 98 Mass. 85, and follow the general doctrine laid down in *Dennick v. Railroad Co.*, 103 U. S. 11. And so in case of *Vawter v. Railroad Co.*, 84 Mo. 679, where it was held by the supreme court of Missouri that an administrator appointed in that state could not maintain an action there for the death of his intestate by negligence of the defendant in Kansas; such action being allowed by the statute of Kansas, but not by that of Missouri. There, also, the case of *Dennick v. Railroad Co.*, and *Leonard v. Navigation Co.*, supra, were pressed upon the court for the general doctrine there laid down; but the supreme court of Missouri declined to adopt or follow those cases, and decided in accordance with what was taken to be the well-established general principle of interstate law in such cases. And even in New York, in the recent case of *Debevoise v. Railroad Co.*, 98 N. Y. 377, it was held that an action by an administrator for damages for the death of his intestate, caused by the negligence of the defendant in another state, could not be maintained in the courts of New York without proof of the existence of a like statute to that of New York in the state where the accident occurred; thus showing that the right of action given by statute for the death of an individual is not transitory, like the common-law right of action for personal injuries, but the operation and force of such statute must be confined to the state

enacting it, except where it can be extended by comity. And whether an action would be sustained by the courts of this state for the death of a person occurring in another state, having a statute of the same or like provisions as our own, is a question not presented in this case, and in regard to which we express no opinion.

The plaintiff having entirely failed to show any such state of case or cause of action as would entitle her to recover in a Maryland court, there was no error in taking the case from the jury, and, therefore, the judgment must be affirmed.

Death by wrongful act — interstate law. — The great weight of authority is now in favor of the proposition that, when the statutes of a state give an action for wrongfully causing the death of a person, such action is transitory in its nature and may be brought in any state where jurisdiction of the defendant can be had. *Dennick v. Railroad Co.*, 108 U. S. 11; *Wabash, etc., R. Co. v. Shacklet*, 105 Ill. 884, 882; S. C., 10 Ill. App. 404; *Shedd v. Moran*, 10 Ill. App. 618; *Burns v. Grand Rapids, etc., R. Co.*, 118 Ind. 169; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Western, etc., R. Co. v. Strong*, 52 Ga. 461; *Bruce's Adm. v. Cincinnati, etc., R. Co.*, 83 Ky. 174, overruling *Taylor's Adm. v. Pennsylvania Co.*, 78 Ky. 348; *Illinois Central R. Co. v. Grudup*, 68 Miss. 291; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977; *Stoeckman v. Terre Haute, etc., R. Co.*, 15 Mo. App. 503. But see Missouri cases cited below. *Missouri Pacific R. Co. v. Lewis*, 24 Neb. 848; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Debevoise v. New York, etc., R. Co.*, 98 N. Y. 377; *Knight v. Railroad Co.*, 108 Penn. St. 250; *Usher v. West Jersey R. Co.*, 126 Penn. St. 206; *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. 852; S. C., 8 Baxter, 341; *McLeod v. Railroad Co.*, 58 Vt. 727; *Boyce v. Wabash Ry. Co.*, 63 Iowa, 70, and *Herrick v. Minneapolis, etc., Ry. Co.*, 21 Minn. 11, support the same proposition, though not actions for causing the death of a person.

Some of the cases lay stress upon the point that the state where the action is brought has a similar statute to that of the state in which the injury occurred. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439. It is difficult to see how the right to maintain such an action can be derived from such similarity of statutory provisions, but if such an action or liability is opposed to the policy of the state where the action is brought, as evinced by its statutes, that would be a sufficient reason for not enforcing it.

If the action is given to some person or persons in their individual capacity, the action should be brought by such person or persons. If it is given to the personal representatives of the deceased, it should be brought by an administrator appointed in the state where the action is instituted. This is the way in which the action was brought in most of the cases cited above. *Usher v. West Jersey R. Co.*, 126 Penn. St. 206. In some cases it is held that the action may be maintained in a foreign state by an administrator appointed in

the state where the injury occurred. *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Western, etc., R. Co. v. Strong*, 52 Ga. 481. It is manifest, however, that this cannot be done, unless there is a statute giving such a right to foreign administrators. The capacity of an administrator is derived wholly from the laws of the state which creates him, and since those laws have no extra-territorial effect, he cannot take that capacity beyond the limits of his own state. "In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the state within which it was granted. All hold that in the absence of such a statute no suit can be maintained by an administrator in his official capacity, except within the limits of the state from which he derives his authority. If he desires to prosecute a suit in another state he must first obtain a grant of administration therein in accordance with its laws." *Noonan v. Bradley*, 9 Wall. 394.

When an action is brought in one state to enforce a liability created by the statutes of another state, the statutes of the latter state must be averred and proved. *Selma, etc., R. Co. v. Lacy*, 43 Ga. 461; *Hyde v. Wabash, etc., R. Co.*, 61 Iowa, 441; *Debevoise v. New York, etc., R. Co.*, 98 N. Y. 377; *Nashville, etc., R. Co. v. Eakin*, 6 Coldw. 582.

But few cases hold directly that an action cannot be maintained to enforce the liability created by the statutes of a foreign state for wrongfully causing the death of a person in such state. Many of the cases usually referred to as supporting this doctrine, will be found upon examination to have been decided upon grounds which do not necessarily preclude the action in some form. The cases directly in point are the following: *Richardson v. New York Central, etc., R. Co.*, 98 Mass. 85; *Vawter v. Missouri Pacific Ry. Co.*, 84 Mo. 679; *Woodard v. Michigan Southern, etc., R. Co.*, 10 Ohio St. 121; *Mackay v. Central R. Co.*, 14 Blatch. 65; *McCarthy v. Chicago, etc., R. Co.*, 18 Kans. 46; *Limekiller v. Hannibal, etc., R. Co.*, 33 Kans. 83; *Hamilton v. Hannibal, etc., R. Co.*, 39 Kans. 56; *Hulbert v. City of Topeka*, 84 Fed. Rep'r, 510. See, also, *Bettys v. Milwaukee, etc., R. Co.*, 37 Wis. 333; *Anderson v. Milwaukee, etc., R. Co.*, 37 Wis. 321. In *Hamilton v. Hannibal, etc., R. Co.*, 39 Kans. 56, it is held that an action cannot be maintained in Kansas to recover for the death of a person in Missouri, without the plaintiff brings his case clearly within the Missouri statute. The case clearly implies that an action would lie if properly brought.

No action will lie under the statutes of one state to recover for an injury or death caused in a foreign state. *Selma, etc., R. Co. v. Lacy*, 43 Ga. 461; *S. C.*, 49 Ga. 106; *Willis v. Missouri Pacific Ry. Co.*, 61 Tex. 432; *State v. Railroad Co.*, 45 Md. 41; *Hover v. Pennsylvania Co.*, 25 Ohio St. 667; *Nashville, etc., R. Co. v. Eakin*, 6 Coldw. 582; *Needham v. Grand Trunk R. Co.*, 38 Vt. 295.

A statute of Louisiana provided that an action for injury to the person should survive for the benefit of certain persons. It was held, in Texas, that the persons entitled to maintain the action in Louisiana could not sustain an action in the former state. *Texas & Pacific R. Co. v. Richards*, 68 Tex. 375.

An action for injuries sustained in Connecticut which did not survive there, cannot, after the death of the person injured, be maintained in Massachusetts by virtue of the statutes of the latter state as to survival of actions. *Davis v. New York, etc., R. Co.*, 143 Mass. 801.

POWERS V. MANHATTAN RAILWAY COMPANY.

(24 N. E. R. 296; 130 N. Y. 173.)

1. ELEVATED RAILROADS. EXEMPLARY DAMAGES FOR OCCUPYING STREET.

The fact that an elevated railroad company neglects for five years after constructing its road in a public street to have the rights of abutting owners condemned, during which time the question of such owners' right to compensation was in litigation, and was the subject of great diversity of views on the part of lawyers and judges, will not justify the giving of exemplary damages in a suit by an abutting owner to recover for damage to his property.

2. PRACTICE. Where a trial court has erroneously instructed the jury that they might allow exemplary damages, a verdict for the plaintiff will be set aside though the damages may be justified by the evidence as compensatory only.

Davies & Rapallo for appellant. *Roger Foster* for respondent.

BROWN, J. At the plaintiff's request, the court instructed the jury "that the failure of the defendant to institute condemnation proceedings before taking possession of the plaintiff's property, and before the trial of this action, entitled the jury to give exemplary damages against them, should the jury so desire." An exception to this charge presents the only error upon which the appellant asks a reversal of the judgment. We think the exception was well taken. To justify an award of exemplary damages, the evidence must show on the defendant's part malice or fraud or gross negligence. The act causing the damage must be wanton or malicious, or gross and outrageous, or there must appear a design to oppress and injure. The purpose of awarding such damages is to punish a wrong-doer, and, unless a wrong motive exists, there is no basis for such award. The elevated road through Division street, in front of plaintiff's property, was constructed in 1879, and trains commenced to run March 1, 1880. It was leased to the defendant by the Metropolitan Railway Company, May 1, 1879. The road was constructed under legislative authority, and the statutes authorizing the creation of elevated railway companies were declared constitutional. In *re Gilbert El. R. Co.*, 70 N. Y. 361; In *re New York El. R. Co.*, 70 N. Y. 327. Whether or not an owner of property abutting on the streets in which the elevated roads were constructed was entitled to damages caused by the construction and operation of the road was a question upon which there was a wide difference of opinion among lawyers and

judges, and was not settled until the decision of this court in the case of *Story v. Railroad Co.*, 90 N. Y. 122 (in October, 1882). It had been decided adversely to the property-owner by the lower courts and the *Story Case* was twice argued in this court, and from the decision finally made three members of the court dissented. The facts of the *Story Case* were not broad enough to necessarily cover the case of an abutting owner, whose only property in the street was an easement for light, air and access, and hence, the right of such owners to maintain actions for damages was not finally set at rest until the decision in *Lahr v. Railway Co.*, 104 N. Y. 268; 10 N. E. Rep'r, 528 (in February, 1887). This action was commenced in August, 1884. In view of these facts thus briefly referred to, and which now form one of the most important and interesting chapters in the history of litigation in this state, it is impossible to find a wrong motive in the entry of the defendant or its predecessor, the Metropolitan Railway Company, upon the street in front of plaintiff's property. It had legislative and judicial authority to support its acts; and, assuming that plaintiff owned the fee in the bed of the street in front of his property, we do not think that a failure to institute condemnation proceedings within the two years following the decision of the *Story Case*, along the whole line of its railway through the city, could be held to be of itself such a wanton and oppressive act as to justify an award of punitive damages.

The respondent claims, however, that the amount of the verdict proves that no exemplary damages were awarded. I do not think this claim is sustained. The verdict is undoubtedly within the estimate given by some of the witnesses, but it is equally true that it is largely in excess of the estimate of others, and we are, therefore, unable to say that the charge of the court which the plaintiff requested did not have weight with the jury, and influence their verdict. The form of the exception is criticised, and it is claimed that it is insufficient to present any question for review in this court, but we are of the opinion that, interpreted in connection with what preceded and followed, it was intended to apply to the request for a ruling upon the question of exemplary damages. The judgment must be reversed, and a new trial granted, with costs to abide the event.

All concur.

Elevated railroads — damages. — See *Newman v. Metropolitan El. R. Co.*, and note, ante; *Tallman v. Metropolitan El. R. Co.*, ante.

SMITH V. SAVANNAH, ETC., RY. CO.

(11 S. E. R. 455; — Ga. —.)

1. RAILROAD COMPANIES. ACCIDENTS AT CROSSINGS. NEW TRIALS. Where, according to the weight of the evidence, there is grave doubt whether the plaintiff ought to recover any thing, the court below is warranted in granting a new trial, even a second new trial, if the damages found by the jury are extreme or excessive.

2. GOING UPON COMPANY'S GROUNDS TO AVOID OBSTRUCTION. After waiting a reasonable time for cars blocking the highway to be removed, a pedestrian may turn aside to avoid the obstruction, and pass over the company's inclosed grounds. In so doing, he will be no trespasser.

3. NEGLIGENCE A QUESTION FOR THE JURY. While upon the company's grounds, under such circumstances, the diligence for his safety due from the company, as well as his own diligence in guarding against danger, is for determination by the jury. If the jury think his presence ought to have been foreseen or anticipated, ignorance of it would make no difference.

4. Particular means or measures of diligence appropriate for use by each party should be left to the jury.

Denmark & Adams for plaintiff in error. *Chisholm & Erwin* for defendants in error.

BLECKLEY, C. J. 1. Although this was the second grant of a new trial, we would be disposed to uphold it if it rested alone upon the ground that the damages found by the jury are excessive. The case is an exceedingly close one for any recovery at all, and, this being so, there ought to be no extravagance or excess in the amount of damages which the company shall pay. Although the plaintiff was under ten years of age, he seems to have been a bright boy, having enough development of mind to know that he was doing wrong not to wait for the cars to get out of his way at the crossing, and in passing over the tracks in the company's switching yard, where he was injured. Not only his capacity to know, but the actual state of his knowledge, was shown by his testimony, in so far as the evidence given by a child can manifest the operations of his own mind.

2. As there is to be a new trial, we will briefly indicate our

their safety. It also appeared that the by-laws of the bank required an examination every three months, by a committee, of all matters pertaining to the affairs of the bank, and that such examination was in fact made every three months of the assets of the bank. Held, that there was sufficient evidence to sustain a finding of negligence.

3. Evidence of the want of such care as the bailee generally bestows upon his own property, is strong and persuasive evidence of negligence on his part with respect to the property bailed.

4. The failure of the bank to produce the cashier as a witness, or to account for his absence, was a circumstance which afforded an inference against the bank.

Orin Gambell for appellant. *J. M. Landon* for respondent.

RUGER, C. J. Many of the questions involved in this case are authoritatively decided in the case of *Pattison v. Bank*, 80 N. Y. 82. It is there held that national as well as state banks have authority to receive bonds and other securities, gratuitously and otherwise, for safe-keeping and general banking purposes, from third persons, as a customary and usual incident of the business of banking; and that where the proof shows that the cashier has been accustomed, with the knowledge of the directors of the bank, to receive such deposits, it is a question of fact for the jury to determine whether he did so on behalf of the bank or as an individual. It is also plainly inferable from that case that private instructions given to the cashier by other officers of the bank in relation to deposits, which are not communicated by him to the depositors, do not constitute any limitation upon the liability of the bank in case a loss occurs. See, also, *Caldwell v. Bank*, 64 Barb. 333. It was further held therein that a bank is chargeable for the loss of securities, gratuitously kept, for gross negligence alone; and that, having lawfully received securities on deposit, it was bound either to return them when called for, or show some sufficient ground for not doing so. It is obvious that a bailee, whatever the character of the bailment may be, when its purpose has been fully satisfied and performed, is bound, upon request, to redeliver the thing bailed to its lawful owner. This is necessarily implied, in all cases, from the nature of the contract of bailment. The authorities are uniform to the effect that such redelivery may be excused in the case of a bailment mutually beneficial to the parties, by proof that the deposit has been lost or destroyed, without negligence, or the want of such care on the part of a bailee as

prudent men, under similar circumstances, commonly take of their own goods. In the case of gratuitous bailments, however, the bailee is liable only when chargeable with gross neglect. *Edw. Bailm.*, § 7 et seq.; *Jones Bailm.* 23. It necessarily follows from the nature of the obligation, and the refusal to return the property, that the burden of showing the circumstances of the loss rests upon the bailee; and, unless the evidence shows the exercise of due care by him according to the nature of the bailment, he will be held responsible for the breach of his contract to return the property bailed. *Pattison v. Bank*, supra; *Caldwell v. Bank*, supra; *Collins v. Bennett*, 46 N. Y. 490; *Cutting v. Marlor*, 78 N. Y. 454; *J. Russell Manufg Co. v. New Haven Steamboat Co.*, 50 N. Y. 121. The sufficiency of the evidence to establish the exercise of proper care will generally be a question of fact for the jury to determine, upon all of the circumstances of the case; and the question here presented is whether, under the circumstances proved, the jury was warranted in finding that the defendant was negligent in exercising the degree of care required for the safe-keeping of the bonds in question.

The proof showed that the plaintiff was a merchant residing at Troy, and a regular customer of the bank; and in March, 1883, left his bonds with the bank as collateral security for discounts made, and to be made, for him by such bank upon notes signed by him alone; and that they were never returned, or offered to be returned, to him by the bank. Discounts and renewals upon the security of such bonds were obtained by the plaintiff from time to time, extending over a period of nearly four years, when the last discounted note held by the bank was paid by an agent of the plaintiff. Upon that occasion the cashier delivered to the agent, upon his own suggestion, a receipt, signed by him as cashier, acknowledging that the bonds had been received by the bank as collateral security for discounts made by it to plaintiff, and that, all such loans having been paid, the bonds were retained for future like use or safe-keeping, subject to the plaintiff's order. Thereafter, as theretofore, the bank continued to pay the coupons falling due on the bonds to the plaintiff until October, 1887. In February, 1887, the plaintiff demanded the return of the bonds, and was informed that they could not be found; but no information was afforded him in respect to the circumstances attending their dis-

appearance, or the mode by which they had been removed, if at all from the possession of the bank. Upon the trial the defendant gave evidence tending to show that it was the custom of the bank to return securities held as collateral to the owner upon payment of loans; but that while they were so held they were kept, with other valuable securities belonging to the bank, in a steel box, inclosed in an iron safe, which was inclosed in a vault. The iron safe, as well as the steel box, had combination locks; and the combination upon the steel box was known to the president and cashier alone, and the cashier alone had a key thereto. There was evidence also given to the effect that the cashier had been in the employ of the bank for many years, and was a man of good reputation until December, 1887, when he was removed from his position for the alleged reason that he was a defaulter. Neither the circumstances nor the character of the defalcation was shown. All the bank officers, except the cashier, testified that they had no knowledge of the possession by the bank of the bonds in question, or the place where they were kept, after the loans were paid; and that they, respectively, had not abstracted them from the bank. The by-laws of the bank provided for the appointment by its president, once, at least, in every three months, of a committee consisting of two members of the board, who, together with the president and cashier, should constitute a committee of examination, and who were required to examine all matters "pertaining to the affairs of the institution," and report the same to the board. In actual practice, examinations were made only once in six months, instead of three, and by three examiners, instead of two. The examinations were in fact confined to the securities owned by the bank, and such as it held as collateral for unpaid loans; but the reports showed no account of such collaterals, or of special deposits. The bank was accustomed to receive special deposits for safe-keeping from its customers, which were usually kept in the vault, but no entry thereof was made on the books of the bank, and no subsequent examination, inspection or report, in relation thereto, was ever made, or provided for through by-laws, except as hereinbefore stated. Examinations of the affairs of the bank were also annually made by a government inspector; but they related only to the loans, discounts, revenues and property of the bank, and did not include an inspection of its special deposits

or unreturned collaterals. No evidence was given tending to show the cause of the abstraction or disappearance of the plaintiff's bonds, except that inferable from the circumstances above enumerated.

We are of the opinion that the bank, under the circumstances of this case, was not a gratuitous bailee of the bonds, and was, in any view, liable, at least, for the want of ordinary and reasonable care and diligence in their custody. The bonds came into its hands in the usual course of business, as collateral security for loans to a customer; and it had never relieved itself of the liability thereby incurred by returning, or offering to return, them to their owner. On the contrary, it agreed, through its proper financial agent, to continue as their custodian for the purposes for which they had theretofore been employed. The making of such a contract was clearly within the power of the officer charged with the duty of negotiating loans and discounts, as one of the necessary incidents of the business he was employed to perform. The extension of lines of discount and credit to persons engaged in business upon stipulated securities is one of the most common features of banking; and it must often happen that such loans are from time to time wholly or practically paid and satisfied. But we think this fact would not change the character of the liability of the bank in respect to the safe-keeping of such securities. Intervals of days, weeks and months may frequently elapse between discounts; and it would be quite absurd to hold that during these periods the bank occupied any other relation to its customer than that of custodian of his bonds for purposes deemed mutually beneficial to both parties. The arrangement contemplated a course of business which was to continue for an indefinite period; and the notion that the bank was responsible for the safe-keeping of the customer's securities so long, only, as particular loans were running, is founded upon too narrow a view of the obligation of the bank. The contract under which the bank held the bonds extended from the time of their reception until they were finally returned to the depositor; and its liability remained unchanged so long as the contract was in force. This contract inured to the mutual benefit of the parties, as it afforded the depositor ready facilities for raising money; and to the bank the profits of the business, the retention of its customer, and adequate security from

loss in the transaction of its business. Having arrived at the conclusion that the bank was not a gratuitous bailee, but received a compensation for the bailment, it follows that it was chargeable with the exercise of a high degree of care in their keeping.

It is not important, in this case, to consider with critical accuracy the difference between the various degrees of care required as to the several kinds of bailments, inasmuch as the evidence authorized the jury to find that the defendant omitted the exercise, not only of a high degree of care, but also of that denominated "ordinary or reasonable care." The test of what is regarded as gross negligence, or a want of the highest degree of care, by a bailee, as stated in the case of *Foster v. Bank*, 17 Mass. 499 (a leading case in this country upon the doctrine of the non-liability of banks to special depositors), is "the degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind." Ordinary neglect is said in the same case to be, according to Sir William Jones, "such as would not be suffered by men of common prudence and discretion." While it is held in this state that the fact that the bailee's property is also stolen at the same time as that of the bailor does not furnish conclusive evidence of the exercise of ordinary care (*Pattison v. Bank*), yet it is the uniform doctrine of the cases that evidence of a want of such care as the bailee generally bestows upon his own property is strong and persuasive evidence of negligence on his part with respect to the property bailed.

We have been unable to discover in the evidence before us proof of the exercise of reasonable care by the bailee in the custody and keeping of the bonds after the loans were discharged. Wherever they might have been kept while the loans were pending, or whoever might then have been charged with their custody, after that time no effort or precaution seems to have been adopted by the bank to identify and protect the property from misappropriation by its officers and clerks. So far as appears, any or all of the employees of the bank could at any time have abstracted what the bank termed "special deposits," and would have been practically safe from discovery or detection, except by accident or chance, for an indefinite period of time. A course of business affording such opportunities to fallible guardians presents an ir-

resistible temptation to use the property under their control for illegal purposes, and usually results in the loss of the securities thus exposed. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278. While the bank protected its own property from loss or embezzlement through its employes, by entries in its books as to its account and character, and by frequent examinations ascertained its safety and condition, no such precautions were taken with references to the property of customers left in its possession. No precaution whatever, either by keeping a record of such securities, and thus facilitating the tracing and recovery of them in case of loss, or examinations, inspections or inquiry in relation thereto, were resorted to or provided for by the defendant; but they were left exposed wholly to the self-restraint and unguarded control of those having opportunity to take them. *Caldwell v. Bank*, *supra*. The claim that, immediately upon the payment of the loans for whose security the bonds were held, the bank could abandon their possession to the officer receiving payment thereof, without incurring liability to their owner, is too fallacious to need serious refutation. We think the case fails to show the exercise of reasonable care by the bank in the keeping of these bonds. A board of directors which leaves the custody, control and management of its securities and property to a single officer, no matter how high may be his character and reputation, for a long space of time, without supervision, examination or inquiry, is justly subject to the charge of negligence in the performance of its duty. It is said in *Morse on Banking* (page 77), as to the duty of directors of banks, that they "are bound to constant activity, and thorough acquaintance with the daily course of the affairs and dealings of the institution. It is their duty to make this acquaintance so thorough that no officer can continue long and consistently to usurp a function of any degree of importance whatever without their knowledge." It is further said (on page 84), in relation to the duty of a board of directors in supervising the conduct of the officers of a bank, that if such officers had borne bad characters, or had circumstances of suspicion, or demanding inquiry come to the knowledge of the board, or had the board, for any reason, been unwilling to trust their own property with them in the same manner in which they trusted the property of the bank,

a case might have been made for holding the bank liable for a loss occurring to a special depositor.

It was said by the late Chief Justice Church, in *Cutting v. Marlor*, 78 N. Y. 460, that "a corporation is represented by its trustees and managers. Their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this; but, in addition, they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice. * * * Here were no supervision, no meetings, no examination, no inquiry. * * * 'A system of management of a banking-house, in which such conduct of its officers was permitted, was a breach of duty, and grossly negligent towards its dealers, and persons having stocks and bonds in its keeping.'" This language is peculiarly applicable to this case, and correctly states the rule by which the evidence for the defense should be considered. That evidence utterly fails to show the exercise of that degree of care which it bestowed upon its own property, or the circumstances attending the loss of the bonds from which such care might be inferred, and fully supports the verdict of the jury. The defaulting cashier was not called to explain their disappearance, or to state whether he took them or not; and no explanation was given why he was not so called. He was the agent whom the bank had employed as the custodian of its funds, and represented it in its transactions with the public; and, in the absence of other sufficient evidence of their loss, we think it was the duty of the bank, if it was able to do so, to produce this witness for examination on the trial, and, in the absence of such testimony, the jury might well have found that the defendant had not sufficiently shown that the bonds were lost without neglect on its part. The evidence was insufficient to establish, as a proposition of law, that the cashier had stolen the bonds, or that they were appropriated by him; and it was a possible explanation or solution of their non-delivery that they had been inadvertently mislaid, or delivered to another depositor, by some officer of the bank, or were used by the cashier in the business of the bank, or appropriated by the defaulting cashier after

his misconduct had been discovered. We think the charge of the court was not justly subject to criticism in respect to remarks made relative to the degree of care required of the bank to relieve itself from liability to the plaintiff. Under the principles governing the case hereinbefore laid down, the bank was liable for an omission to exercise ordinary and reasonable care in protecting the property of its customers; and such care, we think, excludes the commission of any act of negligence by the bailee. In pursuance of these views, the judgments of the courts below should be affirmed.

All concur; Gray, J., in result.

1. *Liability of bank for special deposits.*—Maury v. Coyle, 34 Md. 285; Foster v. Essex Bank, 17 Mass. 497; Smith v. First National Bank, 99 Mass. 605; Lancaster Co. National Bank v. Smith, 62 Penn. St. 47; Scott v. National Bank, 72 Penn. St. 471; DeHaven v. Kensington National Bank, 81 Penn. St. 95; First National Bank v. Rex, 89 Penn. St. 308; First National Bank v. Zent, 89 Ohio St. 105; Griffith v. Zifferwick, 28 Ohio St. 388; First National Bank v. Ocean National Bank, 60 N. Y. 295; Pattison v. Syracuse National Bank, 80 N. Y. 94; Chattahoochee National Bank v. Schley, 58 Ga. 369; Levy v. Pike, 25 La. Ann. 630; Whitney v. First National Bank, 55 Vt. 154; Sturges v. Keith, 57 Ill. 451; Giblin v. McMullen, L. R., 2 C. P. 317; United Society of Shakers v. Underwood, 9 Bush, 609.

2. *Liability of bank for property pledged as collateral security.*—Cutting v. Marlbor, 78 N. Y. 454; Jenkins v. National Village Bank, 58 Me. 275; Dearborn v. Union National Bank, 58 Me. 278; Third National Bank v. Boyd, 44 Md. 47; Prather v. Kean, 29 Fed. Rep'r, 498.

Where bonds or other property are left with a bank to be used as collateral security from time to time, the bank owes the same duty to the owner regarding them when they are not in actual use as collateral as when in use. Third National Bank v. Boyd, 44 Md. 47; Prather v. Kean, 29 Fed. Rep'r, 498.

HOWELL ET AL. V. ROBERTS ET AL.

(45 N. W. R. 923; — Neb. — .)

1. **STOCKHOLDERS. STATUTE IMPOSING LIABILITY, WHETHER PENAL. LIMITATION.** Section 136, chapter 16, Compiled Statutes of Nebraska, which makes stockholders in a corporation liable for debts contracted by the corporation while its officers are in default in publishing an annual notice, stating "the amount of all existing debts of the corporation," is *quasi* penal, but is not a penalty, the evident purpose being to secure the rights of creditors, and an action to recover such debts is not barred by the statute of limitations in one year.

Morning & Keester for plaintiffs in error. *C. C. Flansburg* for defendants in error.

MAXWELL, J. This action is brought upon four drafts, each for \$1,200, which were drawn upon and accepted by the Nebraska Lumber Company of Red Cloud. The drafts are dated December 5, 1885, and were payable, respectively, February 10, 1886, February 25, 1886, March 15, 1886 and March 25, 1886. The drafts not being paid, an action was brought on the 28th of December, 1887, against the defendants, who were the stockholders in the corporation. A demurrer to the petition was sustained in the court below, and the action dismissed. The plaintiff in the petition, after stating the incorporation of the lumber company, and that the defendants were the stockholders thereof, the acceptance of the drafts, etc., alleges: "The said Nebraska Lumber Company, its officers, agents, directors, stockholders, managers or servants, did not at any time post, in a conspicuous place, at the places of doing business of said corporation, subject to public inspection, a copy of the by-laws of said corporation, and the names of all officers appended thereto; and said Nebraska Lumber Company neglected to give notice annually in some newspaper printed in the county or counties, in which its business was transacted (there being newspapers printed in the said counties), of the amount of all existing debts of the corporation, signed by the president and a majority of the directors, as required by the statutes of the state of Nebraska; that all of said defendants were stockholders in said Nebraska Lumber Company, and were such stockholders at the time of such default in failure to give the notice first above mentioned, and when such stockholders at the time of the failure to post a notice stating the names of officers and the place of doing business, and were stockholders at the time of the failure to give a notice of indebtedness required by law, as above stated, and were such stockholders at the time the debt owing to this plaintiff was contracted; that by reason of such neglect and default the said defendants, stockholders as aforesaid, would become liable for the debt now owing from the Nebraska Lumber Company to this plaintiff; that said corporation was at the time the indebtedness herein stated was contracted, and now is, insolvent."

There are four counts in the petition, one upon each draft. It is sought to make the stockholders personally liable because they failed to publish the annual statement required by law. Section 136, chapter 16, Compiled Statutes, provides that "every corporation hereafter created shall give notice annually, in some newspaper printed in the county or counties in which the business is transacted, and, in case there is no newspaper printed therein, then in the nearest paper in the state of the amount of all the existing debts of the corporation, which notice shall be signed by the president and the majority of the directors; and if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given." It is claimed by the attorneys for the defendants that the provision in question is a penalty, and hence that under section 13 of the Code this action is barred in one year from the time the cause of action accrues, and this is the principal question in the case. In *White v. Blum*, 4 Neb. 563, Lake, C. J., in speaking of the personal liability of stockholders in a railway corporation, says: "The first is the only individual liability to which a stockholder in a railroad company can possibly be subjected if the law be faithfully observed, while that given by sections 136 and 139 may be regarded as being in the nature of a penalty denounced against all the members of a corporation, whenever it fails to observe those reasonable rules which the legislature seems to have considered necessary for the protection of the public against the evils of corrupt and irresponsible organizations that might otherwise exist." In *Smith v. Steele*, 8 Neb. 115, the precise question here involved was before the court, and it was held that the stockholders were personally liable for all debts contracted by a corporation while the officers were in default in publishing the notice required. Citing *Garrison v. Howe*, 17 N. Y. 458.

The question was again before the supreme court in *Doolittle v. Marsh*, 11 Neb. 243; 9 N. W. Rep'r, 54, in an action to subject the property of the stockholders of the Omaha Street Railway Company to the payment of a judgment recovered by Mrs. Doolittle against said railway for injuries sustained by her while attempting to alight from one of its cars. It was held that the debts referred to in sections 136 and 139 of chapter 16 were those

arising upon contract, and not damages for torts. Judge Cobb in the opinion says: "The debts spoken of in the two sections undoubtedly are only those obligations arising on express and implied contracts growing out of dealings between the corporation and other corporations or individuals, where the financial condition of such corporations would or might be the foundation of credit. The law has made it one of the conditions upon which the promoters and managers of corporations may do business without risk to their private fortunes, that such corporation shall publish annually a true statement 'of the amount of all the existing debts of the corporation.' The only useful end which such statement can serve is to furnish persons, about to give such corporation credit, a basis of information for their guidance. The tangible personal property of the corporation shows for itself; its real estate can be learned from the records; but, in order to be enabled to properly rate its credit, one must know the amount of its debts." This, in our view, is a correct statement of the law. Section 136 of chapter 16, while in the nature of a penalty, and in some of the cases is spoken of as such, yet is not a penalty in fact. It is designed for the safety of creditors of irresponsible corporations. It is a provision that, in case the officers of a corporation fail to publish an annual statement setting forth the facts required by statute showing the financial condition of such corporation, and while thus in default debts are contracted by the corporation, the stockholders are liable for such debts. The statute is *quasi* penal, but not a penalty, and a cause of action is not barred in one year from the time the cause of action accrues, the limitation being the same as in other contracts. The judgment of the district court is reversed, and the cause remanded for further proceedings.

The other judges concur.

The same statute which was under consideration in the foregoing case, was again passed upon and the above decision approved and followed in *Coy et al. v. Jones et al.* (Neb.), 47 N. W. Rep'r, 208. See, also, *Wolverton v. Taylor*, post, and *Cochran v. Wiechers*, post.

WOLVERTON ET AL. V. GEORGE H. TAYLOR & Co. ET AL.

(23 N. E. R. 1007; — III. —.)

1. STOCKHOLDERS. STATUTE IMPOSING INDIVIDUAL LIABILITY, WHETHER PENAL. LIMITATIONS. An Illinois statute provides that if the indebtedness of any corporation shall exceed the amount of its capital stock the directors and officers assenting thereto "shall be personally and individually liable for such excess to the creditors of such corporation." Held, that the statute did not impose a penalty, and that an action thereunder was not barred within the time limited for the recovery of penalties.

2. NATURE OF THE LIABILITY UNDER THE STATUTE. The liability under said statute is not absolute, but is only to be enforced to the extent that the corporation fails to pay its creditors, and is, therefore, in the nature of a security to the creditors of the corporation.

3. WHEN ACTION UNDER STATUTE ACCRUES. The action does not accrue immediately upon the officers assenting to the excessive indebtedness, but only upon the maturing of the debt or some part thereof.

4. LIMITATION. In this case, which was a bill in favor of the holders of a series of notes forming a part of such excessive indebtedness, it was held that the action did not accrue until the maturity of the first of said notes, and was not barred until the lapse of the statutory period from that time.

Consider H. Willett for appellants. Edward F. Gorton and Edward W. Russell for appellees.

WILKIN, J. Bill in chancery, by appellants against appellees, to enforce an alleged liability against the said George H. Taylor and William H. Langley as directors and president and treasurer of a corporation called "Geo. H. Taylor & Co.," under section 16, chapter 32, Revised Statutes, entitled "Corporations." The bill is on behalf of appellants, and all other creditors of said corporation who shall come in and contribute to the expense of the suit. It was filed in the superior court of Cook county on the 12th day of January, 1888. It appears from the allegations of the bill that said George H. Taylor & Co. was duly organized as a corporation, under the laws of this state, for the purpose of manufacturing, purchasing and selling paper bags and other articles pertaining to the paper trade, and that while engaged in carrying on its said business it executed twelve certain promissory notes payable to the order of Lucius Clark & Co. These notes were all executed more than five years prior to the filing of the bill, but between the date of their maturity and the bringing of the action

less than five years had elapsed. They were for different amounts, running from \$725 to \$1,252 — aggregating about \$10,000. Prior to the filing of this bill, two of these notes had been assigned by said payee, Lucius Clark & Co., to the complainant Wolverton, four to the complainant, the North-Western National Bank of Chicago, and six to complainant Charles A. Clark. It is alleged in said bill that when said notes were executed, and the indebtedness for which they were given contracted, the defendant George H. Taylor was director and president, and the said William H. Longley was director and treasurer, of said corporation, and at said time the indebtedness of said corporation exceeded its capital stock, of \$50,000, to the extent of \$100,000, to which said Taylor and Longley, as such directors and president and treasurer, assented. It is also alleged in said bill that said corporation is insolvent, and has ceased to do business. The statute of limitations having been set up by defendants by way of demurrer to the bill, complainants, by leave of court, filed an amendment thereto, in which they alleged that they had no knowledge of the fact that the indebtedness of the said corporation exceeded its capital stock until its financial failure and refusal to pay its debts, February 28, 1883, and that, if any cause of action accrued to them at the date of said notes, the holders of the same at that time, and the complainants since, had no knowledge of the existence of such cause of action, which was fraudulently concealed from the holders of said notes by said defendants until February 28, 1883. To the bill as thus amended defendants again demurred, alleging as special cause therefor that it appeared upon the face of the bill that the cause of action sought to be enforced against them did not accrue within two years nor within five years prior to the commencement of the suit. The superior court sustained the demurrer, and dismissed the bill, at complainants' cost. The appellate court of the first district affirmed that decree, and complainants below again appealed.

The section of the statute under which the bill is filed is as follows: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation." Rev. St. Ill., chap. 32, § 16. No question is made as to the sufficiency

of the bill to charge appellees under this section, had it been filed in apt time. The sole question for decision is, do the facts stated in the bill bring the cause of action within the bar of the statute of limitations?

The demurrer is based upon two propositions, viz.: (1) The liability of appellees, if any exists, is for a statutory penalty, the cause of action against them accruing immediately upon their assenting to the excessive indebtedness; and, therefore, the two years' bar, under section 14, chapter 83, Revised Statutes, entitled "Limitations," was complete when the bill was filed. (2) Although the liability is not penal, the cause of action accrued at the date of contracting the excessive indebtedness; and, therefore, the five years' bar, under that clause of section 15, chapter 83, which provides that all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued, had run before the bill was filed. To the first of these propositions, appellants reply, the action is not for the recovery of a statutory penalty; and to the second, that, the liability not being penal, the cause of action did not accrue until said notes became due, and, therefore, five years had not run when the bill was filed.

A penal statute is defined to be "one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited." Potter Dwar. St. 74. A penalty "is in the nature of punishment for the non-performance of an act, or for the performance of an unlawful act." It involves the idea of punishment, whether enforced by a civil or criminal procedure. And. Dict. Law, 763. In the absence of statutory prohibition, it is not unlawful for the officers of a corporation to contract debts in excess of its capital stock. Unless restricted by statute, corporations, as individuals, may contract debts to the full extent of their credit, without reference to the amount of their capital stock. Neither is it, under all circumstances, bad management in a corporation to contract debts in excess of the amount of its capital stock. Its assets may be of such value as to give it credit, and warrant the incurring of liabilities far beyond that amount. While statutes in some states, by different forms of language, limit the right of such officers to contract indebtedness beyond prescribed limits, in others no restriction whatever has been enacted; and in many of those in which a limit is prescribed the indebtedness which may

be contracted is not limited by the amount of capital stock, but may equal twice or three times that amount. If, therefore, such enactments are to be understood as indicating that it is deemed unwise to allow corporations to incur liabilities beyond a prescribed limit, it must be admitted that the sentiment is by no means harmonious as to where the limit should be placed. These statutes do not, therefore, indicate, as contended by counsel for appellee, that legislatures have considered it bad management in the affairs of a corporation to contract debts beyond the amount of its capital stock. Section 16 of our statute does not prohibit the contracting indebtedness in excess of capital stock; neither does it, in terms, inflict a penalty for so doing. Therefore, a prohibition cannot be implied; and to say, as counsel insist should be done, that the assenting is made unlawful by the infliction of a penalty, is to assume the very question controverted. While it is true that statutes of other states, making officers of corporations individually liable for contracting debts beyond a prescribed limit, have been held to be penal, the language of those statutes will be found materially different from ours, and, so far as we have been able to ascertain, expressly prohibit the incurring of liabilities beyond certain limits fixed. In *Hornor v. Henning*, 93 U. S. 228, the supreme court of the United States, in passing upon an act of congress regulating corporations in the District of Columbia, the language of which is almost identical with that of our statute, held that the act was not penal, for reasons which we think unanswerable. We followed that decision in *Low v. Buchanan*, 94 Ill. 76, in holding that the liability created by section 16 could only be enforced in chancery; and this is, in effect, deciding that the action is not for the recovery of a penalty. "It is a universal rule in equity never to enforce either a penalty or a forfeiture." 2 Story, Eq. Jur., § 1319; *Queenan v. Palmer*, 117 Ill. 619; 7 N. E. Rep'r, 613. In 2 Mor. Priv. Corp., § 908, it is said: "It is not always quite clear what the courts mean to express by saying that statutes of this character are penal, and that they impose upon the directors a penal liability. The liability of directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the courts mean to express. The liabilities of directors to creditors for a tort, or a misapplication of

corporate funds, or a breach of trust, does not arise out of contract; yet the courts would certainly not call this a penal liability or refuse to enforce it because it arose under the laws of a foreign state. Nor is the liability of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law. It is not a penalty or fine imposed by the state for the infraction of public law. The liability of the directors is both in form and substance a private obligation, similar in many respects to that of sureties. It is imposed by the legislature, partly for the purpose of inducing the directors to do their prescribed duties and partly for the purpose of securing the company's creditors from losses caused by those who have control over the company's funds. The statute imposing this liability establishes a new rule of private right—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency." In *Neal v. Briggs*, 12 Ga. 104, it is directly held that a provision in the charter of a corporation prohibiting the contracting of debts in excess of three times the amount of the capital stock paid in is not penal within the statute of that state limiting the bringing of penal actions to a period of six months. We are clearly of the opinion that this action cannot be held to be an action for the recovery of a penalty, within the meaning of section 14 of our statute of limitations.

This view does not conflict with that expressed by the appellate court of the first district; but it was there held that although the statute is not penal, still the cause of action authorized by it accrues immediately upon the officers assenting to the excessive indebtedness, and hence in this case the five years' bar was complete when the bill was filed. In this view we do not concur. We are unable to perceive upon what legal principle it can be maintained that the liability of appellees, though not penal, accrued at the date of the execution of the notes in suit. The object of such statutes, says Thompson in his work on the *Liability of Officers and Agents of Corporations*, page 456, section 20, is to afford creditors of corporations better security for their debts. And again, in section 23, he says: "By the analogy of cases which relate to the liability of shareholders who are not directors, it would seem clear, in the absence of any thing in the statutes importing the contrary, that a creditor could not proceed against the officers

of a corporation without first having obtained a judgment against the corporation. This would seem to be true for stronger reasons than in the case of stockholders; for the liability of the directors is, like that of a surety, *stricti juris*, and obviously ought not to attach so long as the debt can be made out of the company. And so it has been held under a statute charging the directors of insurance companies with liability for losses on policies issued after the company was under a liability to an amount equal to its capital stock." See, also, 2 Mor. Priv. Corp., § 908, *supra*. Even in cases holding such enactments penal in their nature, the fund arising therefrom is not treated as a penalty, but rather as a fund for the indemnity of all creditors; the measure of recovery being limited by the excess assented to. *Sturges v. Burton*, 8 Ohio St. 215. In *Honor v. Henning*, *supra*, it is said: "But it is not readily to be believed that congress intended to make the trustees liable beyond the debts of the bank which it failed or refused to pay; yet, if the excess is a penalty, it would be no defense for the directors to plead that the bank was ready and willing, and had never refused, to pay when demand was made. In fact, while the bank, outside of its capital stock, may have had \$1,000,000 in its vaults ready to pay, a single creditor, who had never demanded his money of the bank, could sue the trustees." The act is also spoken of in that opinion as being "for the benefit of the creditors generally, when the bank proves insolvent." And again it is said, in the same case: "We are of opinion that the fair and reasonable construction of the act is that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors, who are entitled to share in it, in proportion to the amount of their debts, so far as may be necessary to pay these debts. The remedy for this violation of duty as trustees is, in its nature, appropriate to a court of chancery. The power and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the

funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, the amount of their several debts; to determine the sum to be recovered of the trustees, and apportioned among the creditors—in a manner which the trial by jury, and the rigid rules of common-law proceedings, render impossible.”

In *Low v. Buchanan*, supra, we said: “After a careful consideration of the matter, we have reached the conclusion that directors and officers of stock corporations who incur liabilities under the section in question become bound and answerable, not to some particular creditor, but, in the language of the act, to the ‘creditors;’ that is, all the creditors. This construction puts all the creditors upon a perfect equality, and is in conformity with the express words of the act. It was, doubtless, the object and purpose of the legislature that all claims arising under the provisions of the section in question should be regarded in the nature of a trust fund, to be collected and divided *pro rata* among all the creditors; and, if we are correct in this conclusion, it is quite manifest that this distribution of the fund could only be made in a court of equity.” We also then held that all that had been said in *Hornor v. Henning* as to the appropriateness of a chancery proceeding under the act of congress applied with equal force to our statute.

We think it clear that the liability of corporation officers under section 16, supra, is not an absolute liability, but is only to be enforced to the extent that the corporation fails to pay its creditors; that the liability is in the nature of security to all the creditors of the corporation. If this conclusion is correct, the citation of authorities is unnecessary to show that no action can be maintained against the officers until the corporation is in default. For aught that appears in this bill, George H. Taylor & Co., at the time these notes were given, had assets representing not only its \$50,000 capital stock, but the full amount of its excessive indebtedness—in other words was perfectly solvent; ready and willing to pay all its debts as they matured. Suppose the payee of these notes had then filed a bill against appellees to enforce payment. Would it be pretended, in the light of *Hornor v. Henning*, supra, that it could have been maintained? Could not the defendants have answered that the corporation was solvent; “ready and willing and

had never refused, to pay when demand was made?" It is said, however, that if the cause of action does not accrue until the maturity of the debt a bill cannot be maintained until all the debts of the corporation are due, because the liability is for the benefit of all creditors, and must be enforced by a single bill; and, therefore, it is argued, the remedy becomes impracticable, or may be so rendered by the officers contracting debts to mature at a remote period in the future. It does not follow that, because the creditor who files the bill must allege and prove the corporation in default as to his debt, he cannot maintain the bill until all debts against the corporation are due. On the allegations of the bill in question there can be no doubt as to the power of a court of chancery to bring before it the corporation, all its officers who had assented to excessive indebtedness, as well as all its creditors, and in the language of Justice Miller, which, we have said, is equally applicable to our statute, "ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, the amount of their several debts — to determine the sum to be recovered of the trustees, and apportioned among the creditors." But, if the difficulties supposed to exist under the construction that the action accrues only on the maturity of the indebtedness were real, they could not be avoided by holding that it accrues at the date of the contract. The statute certainly does not mean that the officers shall only become liable for one act of assenting to excessive indebtedness during the life of the corporation. The amount in excess may continue to be increased from time to time by different officers, running over a period of years. By a single bill, for the benefit of all the creditors, against all these officers, that excess may be recovered, and made a fund for the payment of all the debts. From what date would the statute of limitations begin to run, in such a case? The officers, if liable at all, are liable to all the creditors of the corporation — those existing prior to the contract creating the excessive indebtedness; those whose debts are created thereby; and also those who may afterward become its creditors. As to the subsequent creditors, could it be said the cause of action accrued before they became creditors? The action must be for their bene-

fit, as well as that of all others; and yet they may not have become creditors of the corporation until more than five years after the first assenting to excessive indebtedness.

The statute not being penal, but intended to afford additional security to creditors, it should be so construed as to effectuate that purpose, without imposing punishment upon the officers, or hardship upon the creditors. To hold that the officers may be sued the moment they assent to the excessive indebtedness, would operate by way of punishment, by compelling them to pay debts long before they become due. On the other hand, that construction would operate harshly on creditors. They have not the means of knowing that the indebtedness of a corporation has been allowed to exceed its capital stock, and may in good faith give credit to a perfectly solvent and even wealthy corporation, for a term of years. By all reasonable rules of business, they cannot be required to look to the collection of their debts until they are due and yet, under the rule contended for, should they find it necessary to resort to this statutory liability of officers, they may be confronted with the statute of limitation, and told that its bar became complete long before the maturity of the debt sought to be recovered.

We hold that the cause of action set forth in this bill did not accrue until the maturity of the notes therein described; that the action is not for the recovery of a penalty; and, five years between the date of the maturity of the first of said notes to fall due and the filing of the bill not having intervened, the action was not barred. The demurrer to the bill should, therefore, have been overruled.

Reversed and remanded.

Shope, C. J., and Bailey, J., dissent.

See *Howell v. Roberts*, ante, and *Cochran v. Weichers*, post, and note.

COCHRAN ET AL. v. WEICHERS ET AL.

(23 N. E. R. 808; 119 N. Y. 899.)

1. CORPORATIONS. LIABILITY OF STOCKHOLDERS. SURVIVAL OF ACTIONS.
A statute of New York provides as follows: "In limited liability companies all the stockholders shall be severally individually liable to the creditors of
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the company in which they are stockholders to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed." Held, that the liability thereby created was in the nature of a contract liability and not of a penal nature, and, consequently, that in case of the death of a stockholder, it would survive against his personal representatives.

Abbott & Fuller (Henry Schmitt of counsel) for appellants.
Henry D. Hotchkiss for respondents.

O'BRIEN, J. The plaintiffs are judgment creditors of the American Opera Company, Limited, a domestic corporation formed under chapter 611 of the Laws of 1875, for the incorporation of business corporations with limited liability. The capital stock of the company was fixed at \$500,000, only \$148,000 of which was ever paid in, and no certificate that the capital stock had been paid in has ever been made or recorded, as prescribed by the statute under which the company was incorporated. The plaintiffs' action is in the nature of a creditors' suit to settle the affairs of the American Opera Company, Limited, and to distribute its assets, as well as the proceeds of the stockholders' individual liability, among the company's creditors. *Pfohl v. Simpson*, 74 N. Y. 137. The complaint alleges the incorporation of the company; the amount of its capital stock; the amount paid in, as above stated; and the fact that no certificate of the company had been made or filed as required by the statute. Numerous persons have been joined as defendants with the opera company, as to whom it is alleged that they are either creditors or stockholders of the company, and among these William A. Weichers was named as a defendant as to whom it was claimed that he was a stockholder holding twenty-five shares of the stock of the company. It is also alleged in the complaint that several of the parties defendant who were stockholders were indebted to the company for their stock. This allegation is general, and the particular persons claimed to be so indebted are not named. Weichers was served with the complaint, and appeared and answered. On or about December 14, 1888, he died, leaving a last will and testament wherein he appointed executors. The will has been admitted to probate by the surrogate of New York county, and let-

ters testamentary issued to the executors, who have qualified and taken upon themselves the execution of the will. After the death of Weichers the plaintiffs applied to the special term to revive and continue the action against the executors, and the special term denied the motion, upon the ground that the cause of action stated in the complaint against the deceased was of a penal character, and did not survive. Upon appeal to the general term from this order, it was reversed, and the court directed that the action be revived and continued against the executors of Weichers, and that the plaintiffs have leave to serve a supplemental summons and complaint on the executors. From the order of reversal the executors have appealed to this court.

The cause of action stated in the complaint against the stockholders is two-fold. First, it is alleged that many of them are indebted to the company for their capital stock; and, second, that as the capital stock was never fully paid in, and no certificate thereof ever made or filed, the defendants who were stockholders are liable for its debts to the extent of their stock. The question is whether a liability of this character on the part of a stockholder to the creditors of a corporation survives. If the liability is penal in its nature, it is conceded that it does not survive; while if the liability is in the nature of a contract obligation it is conceded that it does.

The provision of the statute of 1875 (chap. 611, § 37), upon which this section is based, so far as the stockholders are concerned, is as follows: "In limited liability companies all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed." We think the liability created by this statute survived the death of the stockholder, and continues against the executors. It is not like the liability of a trustee for neglecting to make a report, or for declaring dividends out of capital stock, or acts of a kindred character. These are breaches of duty on the part of the managing agents of the corporation for which the statute has made them liable, and this liability cannot be said

to rest upon or grow out of a contract. The liability of a stockholder in the present case is different. Upon becoming the owner of the stock, he voluntarily assumes the obligations imposed by the statute, and the creditors of the corporation who trust it may be said to do so upon the faith of the statute, which is part of the contract. The statutory obligation is inherent in and forms a part of every contract that the corporation makes with creditors prior to the time that the certificate required by the statute is filed. In *Lowry v. Inman*, 46 N. Y. 119, Allen, J., stated the principle (pages 125, 126) as follows: "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation." In *Wiles v. Suydam*, 64 N. Y. 173, it was sought to hold the defendant as a stockholder in a manufacturing company on his liability under section 10 of the act of 1848, chapter 40 — a section which, in substance, is almost identical with the one now under consideration; and also as a trustee on his liability for all the debts, because of a failure to file a report. A demurrer on the ground of the improper joinder of causes of action was sustained. The court, distinguishing between the two kinds of liability, said (Church, C. J.): "The cause of action against the defendant as a stockholder consists of the debt, and the liability created by statute against stockholders when the stock has not been paid in, and a certificate of that fact recorded. * * * The first cause of action against the defendant as a stockholder is an action on contract. The six years' statute of limitations applies. The defendant is entitled to contribution." The liability of Weichers, therefore, being in the nature of a contract obligation, it survived his death, and the action can be continued against his personal representatives.

In *Bailey v. Hollister*, 26 N. Y. 112, the court expressly recognized this principle. Gould, J., said: "It will be conceded that, when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity,

it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time, which the law may impose upon any holder of the stock, as such. Such liability proceeds, not from any new contract, made by or on behalf of the estate, but is inherent in the property itself; * * * or, calling it a 'contract liability,' it arises out of a contract made by the stockholder, and binding his personal representatives as it bound him, as long as the relation of stockholder existed." The liability of the estate of the deceased stockholder under the statute is so well established upon principle and authority that further discussion is unnecessary. *Chase v. Lord*, 77 N. Y. 1; *Flash v. Conn*, 109 U. S. 371; 3 Sup. Ct. Rep'r, 263; *Richmond v. Irons*, 121 U. S. 27; 7 Sup. Ct. Rep'r, 788. The order of the special term denying the motion to revive and continue the action against the executors was properly reversed by the general term, and its order of reversal should be affirmed, with costs.

All concur.

STATUTORY LIABILITY OF STOCKHOLDERS, WHEN PENAL.

1. *Statement of the question.*— Numerous statutes imposing a personal liability upon the officers or stockholders of a corporation have been declared by the courts to be penal in their nature, and the usual incidents of penal statutes have been applied to the attempts to enforce liability under them. Whether these decisions are founded upon sound legal principles, we shall not stop to inquire. Mr. Morawetz challenges their correctness and states his views as follows:

"It is not always quite clear what the courts mean to express by stating that statutes of this character are 'penal' and that they impose upon the directors a 'penal liability.'

"The liability of the directors under such a statute is undoubtedly not the result of a contract between the directors and the creditors of the corporation; but that is evidently not what the courts mean to express. The liability of directors to creditors for a tort, or a misapplication of corporate funds, or breach of trust, does not arise out of contract; yet the courts would certainly not call this a penal liability, or refuse to enforce it because it arose under the laws of a foreign state.

"Nor is the liability of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law; it is not a penalty or fine imposed by the state for the infraction of a public law.

"The liability of the directors is both in form and in substance a private obligation, similar in many respects to that of sureties. It is imposed by the legislature partly for the purpose of inducing the directors to do their pre-

scribed duties, and partly for the purpose of securing the company's creditors from losses caused by the acts of those who have control over the company's fortunes. The statutes imposing this liability establish a new rule of private right—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called penal appears to be that it does not exist at common law, and is neither created by contract, nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company." 2 Mor. Cor., § 908.

The position, however, that these statutes are penal in certain cases is, doubtless, too well established and supported by too many decisions to be overthrown or abandoned, even if the position is not well taken. The important thing, therefore, is to be able to determine what statutes come within the rule and what do not.

2. Statutes universally held not to be penal.—Statutes which impose a personal liability upon stockholders for the debts of the corporation, as a necessary consequence of their being or becoming stockholders, are not penal in their nature and have never been held so to be. 2 Mor. Corp., §§ 872, 877; Hawthorn v. Caléf, 2 Wall. 10; Corning v. McCullough, 1 N. Y. 47; Queenan v. Palmer, 117 Ill. 619.

3. Statutes universally held to be penal.—The following classes of statutes imposing individual liability upon officers or stockholders, have uniformly been held to be penal in their nature. Statutes imposing a liability upon certain officers for a neglect or failure to make certain reports required by law. Gregory v. German Bank, 8 Col. 832; Halsey v. McLean, 12 Allen, 438; Britung v. Lindaur, 37 Mich. 217; Cable v. McCune, 26 Mo. 371; Derrickson v. Smith, 27 N. J. L. 166; Victory Webb Printing, etc., Co. v. Beecher, 26 Hun. 48; Garrison v. Howe, 17 N. Y. 458; Merchants' Bank v. Beecher, 35 N. Y. 412; Miller v. White, 50 N. Y. 137; Adams v. Mills, 60 N. Y. 536; Wiles v. Suydam, 64 N. Y. 173; Losee v. Bullard, 79 N. Y. 404; Knox v. Baldwin, 80 N. Y. 610; Stokes v. Stickney, 96 N. Y. 323; Bird v. Hayden, 1 Robt. (N. Y.) 383; McHarg v. Eastman, 35 How. Pr. 205; S. C., 7 Robt. 137; Steam Engine Co. v. Hubbard, 101 U. S. 188; Chase v. Curtis, 113 U. S. 452; Union Iron Co. v. Pierce, 4 Biss. 327. Additional citations to this point will be found in note to Gaus v. Switzer, post.

Statutes imposing a liability upon certain persons for making a false report or certificate. Attrill v. Huntington, 70 Md. 191; Stebbins v. Edmonds, 13 Gray, 203; Veeder v. Baker, 83 N. Y. 156. Or for declaring a dividend when the corporation is insolvent or which impairs its capital. Rorke v. Thomas, 56 N. Y. 559.

4. Statutes making stockholders liable until the capital is paid in and certificate filed.—Statutes of this character have been held not to be penal except in Illinois. Flash v. Conn, 16 Fla. 428; Norris v. Wrenshall, 84 Md. 493; Attrill v. Huntington, 70 Md. 191, 197; Wiles v. Suydam, 64 N. Y. 173; Flash v. Conn, 109 U. S. 371. In Wiles v. Suydam the court says: "In effect the statute in such a case withdraws the protection of the corporation from the stockholders, and regards them as liable to the extent of the amount of their stock as co-partners." 64 N. Y. 176.

A statute of Illinois enacted in 1857 for the formation of corporations for

manufacturing, mining, mechanical or chemical purposes, contained a provision of this character. This statute was enforced in several cases without any discussion of whether or not it was penal in its nature. *Culver v. Third National Bank*, 64 Ill. 528; *Steel v. Dunne*, 65 Ill. 298; *Harper v. Union Manf. Co.*, 100 Ill. 225. In the former two cases the suits were at law by a single creditor against a single stockholder. In the latter case it was held that the remedy was in equity only, on behalf of all the creditors and against all the stockholders. The statute made the stockholders "severally individually liable to the creditors of the company to an amount equal," etc. Laws 1857, p. 168, § 9. In *Richardson v. Akin*, 87 Ill. 138, the same statute is spoken of as penal in its nature.

A similar statute applicable to insurance companies was for a time enforced without any question being made as to its penal character. *Butler v. Walker*, 80 Ill. 345; *Gulliver v. Roelle*, 100 Ill. 141. Subsequently it was declared to be penal. *Diversey v. Smith*, 103 Ill. 378; *Gridley v. Barnes*, 103 Ill. 211; *Weidenger v. Spruance*, 101 Ill. 278; *Junker v. Kuhnen*, 18 Ill. App. 478. The statute in regard to insurance companies provided that a certificate should be made and filed with the auditor of state showing among other things, that the capital had been paid in and was possessed in money or authorized securities, that the auditor should deliver to the company a certified copy of the charter and certificates filed with him, which should be recorded in the county where the company was located and which should thereupon be its *authority* to commence business and issue policies. The supreme court held that this was equivalent to an express prohibition against doing business until the capital had been paid in and the law complied with, and that the provision making the stockholders liable for the debts of the company until the capital was paid in and certificate filed, was a penalty imposed for a violation of the statute in commencing business without authority to do so.

5. *Statutes making certain officers liable in case the debts exceed a certain amount.*—These statutes may be divided into two classes: those which contain an express prohibition against the debts exceeding a certain sum and those which do not. Statutes of the latter class have been held not to be penal in all the cases that have come under our observation. *Hornor v. Henning*, 93 U. S. 228; *Wolverton v. Taylor*, ante; *Low v. Buchanan*, 94 Ill. 76.

Statutes of the former class have been held to be penal except in Georgia. *Irvine v. McKeon*, 23 Cal. 472; *First National Bank v. Price*, 38 Md. 487; *Kritzer v. Woodson*, 19 Mo. 327; *Sturges v. Burton*, 8 Ohio St. 215. Contra, *Neal v. Briggs*, 12 Ga. 104. The latter is a very elaborately considered case, but the opinion is too extended to be quoted. In *Sturges v. Burton*, which passes upon a statute substantially the same, the court says:

"There are these peculiar features in the relation of creditors who are authorized to sue directors under this section, and which, to a majority of the court, very clearly distinguish the ground of the action from contract, and show that the action provided for is a penal action: (1) The section does not make the directors personally liable on the contracts of indebtedness which created the excess, but solely for the excess itself. (2) The liability of the directors for the amount of this excess, is not to the persons who hold the contracts of indebtedness created in excess of the limitation, but to any creditor or creditors

of the bank. Hence the ground of the action is not the original contracts with the creditors; those contracts simply give any of them the right or title to sue as plaintiff. (8) The amount of the recovery by any creditor does not depend upon the amount the bank owes him, nor upon the nature of the debt due to him; under the statute, the creditor who sues recovers the amount of the excess, and, that too, whether the debt due the plaintiff forms a part of the excess or not. (4) The liability of the directors is provided for as in penal statutes, to vindicate a violation of law. (5) The action provided is the usual action prescribed by penal statute to recover a penalty. (6) The action of the creditor must be debt, whether his contracts with the bank be such as to authorize such a form of action or not." *Sturges v. Burton*, 8 Ohio St. 215.

6. Criterion for determining whether such statutes are penal or otherwise.—It cannot be denied that a liability which is imposed upon a person as a consequence of the doing or omission of an act, and which is not measured by any injury flowing from the act or omission, is in the nature of a punishment. A statute, therefore, which imposes such a liability, does, in effect, inflict a penalty and is of a penal character.

"It is the effect, not the form, of the statute that is to be considered," says the supreme court of Illinois. "and when its object is clearly to inflict a punishment on a party for violating it — i. e., doing what is prohibited, or failing to do what is commanded to be done — it is penal in its character, and the circumstance that in punishing, a remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant." *Diversey v. Smith*, 108 Ill. 378, 390.

Whether, because a statute imposes a liability which is in the nature of a punishment and is, therefore, penal in its nature, it should be classed as a penal statute, with all the consequences which necessarily follow that conclusion, is a question of serious import. Many statutes are penal in their nature and effect which are not classed as penal statutes. On this subject Mr. Sedgwick, in his work on Constitutional and Statutory Law, says:

"The question is often raised, whether a given statute is properly to be classed as a penal or a remedial law; and it does not seem clearly settled what constitutes a penal statute. A statute declaring that an indictment for an offense committed on board of a boat navigating a river or canal, may be found in any county through which the vessel shall pass, has been said not to be, properly speaking, a penal statute, as it neither creates the offense, prescribes the punishment, nor alters the mode of trial; it merely changes the venue. *The People v. Hulse*, 3 Hill, 309. In Maine, it has been said, that a statute declaring that any person who assists a debtor to defraud his creditor by making a fraudulent concealment or transfer of his property, shall be answerable in a special action on the case of any creditor, in double the amount so fraudulently concealed or transferred, is not a penal statute. *Frohock v. Pattee*, 88 Me. 108. See, also, *Quimby v. Carter*, 30 Me. 218; *Philbrook v. Handley*, 27 Me. 53; *Thacher v. Jones*, 31 Me. 528. A statute giving double damages to a landlord against a stranger for assisting a tenant in carrying off and concealing his goods, by which the plaintiff was prevented from distraining for his rent, has been said in England to be a purely remedial statute. *Stanley v. Wharton*, 9 Price, 301. And so, in Massachusetts, a statute giving

double damages against a town, for an injury to the plaintiff caused by a defect in a highway, has been similarly regarded. Shaw, C. J., in delivering the opinion of the court, said. 'We think the action in the present case is purely remedial, and that it has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is [in the case of a penal action], that it is prosecuted for the purpose of punishment, and to deter others in offending in like manner. Here the plaintiff sets out the liability of the town to repair an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but they are recoverable to his own use, and in form and substance the suit calls for indemnity.' *Reed v. Norfield*, 18 Pick. 94, 100, 101. And on the ground that it was not a penal action, it was held in this case not to be necessary that the declaration should conclude, *contra formam statuti*. See to this latter point *Wells v. Iggulden*, 5 Dowl. & Hayt, 10 Mass. 36; *Nichols v. Squire*, 5 Pick. 168; *Lee v. Clark*, 2 East, 333; *Newcomb v. Butterfield*, 8 Johns. 266. So, too, it has been said, a statute giving four times as much damage as is allowed by law for the detention of other debts, is penal in its character; but as it is given to the party injured, who seeks the recovery of a just debt, to which the increased damages are made an incident, a suit therefor is not properly to be regarded as a penal action. *The Suffolk Bank v. The Worcester Bank*, 5 Pick. 106; *Reed v. Northfield*, 18 Pick. 94; *Palmer v. York Bank*, 18 Me. 166; *Bayard v. Smith*, 17 Wend. 88.

"But on the contrary where a statute gave treble damage against any person who should commit waste on land pending a suit for its recovery, the court said, that the act did not apply to a party wholly ignorant that any suit was pending, saying: 'We can hardly suppose the legislature intended to punish so severely, a trespasser wholly ignorant of the pendency of the suit. The statute is highly penal, and should, therefore, be limited in its application to the object the legislature had in view.' *Reed v. Davis et al.*, 8 Pick. 515, 516. Where a bridge company act declared that it should not be lawful for any person to cross the lake over which the bridge was constructed, within three miles of it, without paying toll, a person entered the lake on the ice six miles from the bridge, and came off on the other side six rods from it. In an action brought to recover back tolls paid, the court held that no toll could be demanded, saying: 'The act is in a measure penal, and ought to be strictly construed. In the construction of statutes made in favor of corporations and particular persons, and in derogation of common right, care should be taken not to extend them beyond their express words and their clear import.' *Sprague v. Birdsall*, 2 Cow. 419, 450." *Sedgwick Statutory and Constitutional Law*, 333.

But, as we have already said, it is well settled by authority that certain statutes imposing upon stockholders or officers of a corporation a liability for the corporate debts, are to be classed as penal statutes, with the same consequences as though they were penal in the strict sense of the term. So far as we are aware all such statutes may be divided into two classes, those under which the liability is incurred as a necessary consequence of becoming a stockholder in the corporation, and those under which the liability is incurred only as the consequence of doing or omitting some act specified in the statute.

In the former class the liability partakes of the nature of a contract, to which the stockholder assents; in the latter of the nature of a punishment. There is no logical basis for making any distinction between different statutes of the latter class. They differ in form and degree, but in substance and effect they are the same, and, if any are classed as penal statutes, all should be.

7. *Consequences of holding such statutes to be penal.*—When such a statute has been determined to be a penal one, the courts apply to it all the incidents which usually attach to penal statutes.

First. Such a statute will only be enforced in the state where it was enacted. Other states will decline to enforce the liability created by it. *First National Bank v. Price*, 88 Md. 487; *Attrill v. Huntington*, 70 Md. 191; *Halsey v. McLean*, 12 Allen, 438; *Derrickson v. Smith*, 27 N. J. L. 166; *Bird v. Hayden*, 1 Robt. (N. Y.) 383. Nor will it make any difference that the liability has been reduced to judgment in the former state. *Huntington v. Attrill*, 70 Md. 191; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265. These decisions are in conformity with the general doctrine that one state will not enforce the penal laws of another. *Story Conflict of Laws*, § 620; *Rorer Interstate Law*, 148.

Second. The statute of limitations applicable to suits for the recovery of a penalty, which usually provides a much shorter period for such actions than for suits upon contracts, will be applied to suits to enforce the liability in question. *Diversey v. Smith*, 103 Ill. 378; *Gridley v. Barnes*, 103 Ill. 211; *Junker v. Kuhnen*, 18 Ill. App. 478; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Losee v. Bullard*, 79 N. Y. 404; *Knox v. Baldwin*, 80 N. Y. 610; *Duckworth v. Roach*, 81 N. Y. 49; *Rector, etc., of Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Sturges v. Burton*, 8 Ohio St. 215.

Third. Such statutes will be strictly construed. *Irvine v. McKeon*, 23 Cal. 472; *Stebbins v. Edmands*, 12 Gray, 208; *Kritzer v. Woodson*, 19 Mo. 327; *Cable v. McCune*, 26 Mo. 371; *Miller v. White*, 50 N. Y. 187; *Rorke v. Thomas*, 56 N. Y. 559; *Adams v. Mills*, 60 N. Y. 533; *Whitney Arms Co. v. Barlow*, 68 N. Y. 62; *Bunnell v. Griswold*, 80 N. Y. 128; *Bruce v. Platt*, 80 N. Y. 379; *Kirkland v. Kille*, 99 N. Y. 390; *Butler v. Smalley*, 101 N. Y. 71; *Whitaker v. Masterton*, 106 N. Y. 277; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Chase v. Curtis*, 113 U. S. 452.

Fourth. In case of the repeal of such a statute without a saving clause, all claims thereunder, whether in process of litigation or not, are swept away and all liability thereon is blotted out, unless such liability has been reduced to judgment before the repeal of the statute. *Gregory v. German Bank*, 3 Col. 332; *Breitung v. Lindaur*, 37 Mich. 217; *Knox v. Baldwin*, 80 N. Y. 610; *Victory Webb Printing, etc., Co. v. Beecher*, 26 Hun, 48; affirmed, 97 N. Y. 651; *Carr v. Resher*, 50 Hun, 147; *Union Iron Co. v. Pierce*, 4 Biss. 327.

Fifth. The cause of action created by such statutes, being penal in its nature, does not survive at common law and can only survive by virtue of some special statute. *Stokes v. Stickney*, 96 N. Y. 323. And see *Davis v. New York, etc., R. Co.*, 148 Mass. 301; *Blake v. Griswold*, 104 N. Y. 618.

Sixth. It is laid down as a general rule that a court of equity will never enforce a penalty or forfeiture. 2 *Story Eq.*, §§ 1319, 1494, 1509; 1 *Pom. Eq.*, § 459. It would seem to follow as a logical consequence, if the liability imposed by the statutes now under consideration is penal in its nature, that such

liability cannot be enforced in equity. *Low v. Buchanan*, 94 Ill. 76, *Jameson v. Palmer*, 117 Ill. 619; *Hornor v. Henning*, 93 U. S. 228. In endeavoring to trim between this equitable doctrine and the doctrine which declares such statutes penal, it seems to us the courts have come to some absurd conclusions. We refer particularly to the cases of *Hornor v. Henning*, 93 U. S. 228; *Low v. Buchanan*, 94 Ill. 76, and *Wolverton v. Taylor*, ante. We have little doubt but what if the question had arisen in some other form in these cases, as, for instance, on the statute of limitations, a different conclusion would have been reached. Is not the abhorrence of equity to the enforcement of penalties more sentimental than real, and is there any well-founded reason why equity should not enforce a liability of a penal nature in favor of corporate creditors and against stockholders or officers, when that is the only jurisdiction which can afford adequate relief and do justice to all parties? The reasoning of the cases last referred to is in effect that the liability imposed by the statute under consideration can only be adequately enforced in a court of equity, and, therefore, such liability is not penal. This is reversing the ordinary processes of reasoning. The effect of these statutes must be the same whether the liability is enforced in equity or at law. If a man is compelled by law to pay a sum of money merely because of an act or omission and not by way of compensation for any injury resulting from such act or omission, such payment is clearly in the nature of a punishment. It can make no difference in the essential nature of the matter whether he is compelled to pay by the decree of a court of equity or the judgment of a court of common law.

Seventh. Other questions of practice may arise in consequence of declaring such statutes to be penal. The Code of New York requires that actions to recover a penalty or forfeiture imposed by statute, shall be tried in the county where the cause of action, or some part thereof, arose. It was held that a liability imposed upon the officers of a corporation for making a false report must be enforced in the county where the report is filed. *Veeder v. Baker*, 83 N. Y. 156.

It has also been held that a claim to recover under a statute making the stockholders liable for the debts of the company until the capital stock is paid in and a certificate thereof filed, and a claim under a statute making the officers of the corporation liable for a failure to file a report, cannot be joined in the same action. *Wiles v. Suydam*, 64 N. Y. 173.

Under a statute which provides that the verification of the answer may be omitted where the party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading, the defendant's answer in this class of suits need not be verified. *Gudsen v. Woodward*, 103 N. Y. 242.

Eighth — Constitutional law. — The power of the legislature to impose such liability upon the stockholders of existing corporations, or to repeal such a statute as against existing creditors, may turn upon the question of whether such a statute is penal. *Richardson v. Akin*, 87 Ill. 133; *Weidenger v. Spruance*, 101 Ill. 278; *Breitung v. Lindaur*, 37 Mich. 217.

LENT V. NEW YORK CENTRAL, ETC., R. Co.

(24 N. E. R. 653; 120 N. Y. 467.)

1. RAILROAD COMPANIES. PERSONAL INJURY. NEGLIGENCE. Plaintiff was standing on the front platform of a train, with numerous others, waiting for a car which was to be attached. The car was backed down, the usual jolt was felt, and the passengers hurried into the forward car. The cars, however, failed to couple, and, as plaintiff attempted to step to the forward car, the two receded and she fell. The coupling apparatus was of an approved kind and in good order and there was no negligence in not effecting the coupling. There was evidence that, as the cars bumped together, the conductor shouted, "All aboard." This was denied by the conductor and others. Held, a question for the jury, and that if they found that the conductor called out "All aboard" it was sufficient evidence of negligence to sustain a verdict.

2. CONTRIBUTORY NEGLIGENCE. Whether the plaintiff was guilty of contributory negligence in not observing that the coupling was incomplete, was a question for the jury under all the circumstances, such as the fact that it was after dusk, her natural eagerness to hasten forward and get a seat, the call of the conductor and the fact that others had passed over in safety.

Frank Loomis for appellant. *Aaron Penington Whitehead* or respondent.

BRADLEY, J. The plaintiff suffered personal injuries which she alleges were occasioned by the negligence of the defendant. They were caused by her fall, when she was proceeding to step from the platform of one car onto that of the next car preceding it, through an opening between them, which she did not observe. The facts were that the plaintiff with her brother, Mr. Russell, and her brother-in-law, Mr. Gilbert, were at the Peekskill depot to take the train due there at 7:46 P. M. for New York on July 6, 1884. That the train was late, and when it arrived the plaintiff with her party got onto it, and proceeded through the cars to the rear; and, finding all the seats occupied, they, upon the information of the conductor that another car would be put into the train, and at his suggestion, alighted from the rear of the train, and proceeded toward the forward end of it. The engine, with a section of the train, had then been severed from the rear portion, and proceeded east, thence back onto a switch, to there take on an empty car. The plaintiff, with Russell and Gilbert, got onto the front platform of the most easterly car of the stationary portion of the train, to await the connection with it of the empty

car, which soon after was backed up, and, when they came together, persons standing on the platform passed from it into the empty car; Gilbert with them. He called to the plaintiff to come into it, which she undertook to do, and, when proceeding to step from the platform of the one to that of the other car, she fell between them onto the track, and received the injury complained of. The open space between the platforms of the two cars was occasioned by the failure, when they came together, of the draw-heads to catch and complete the coupling; in consequence of which the cars receded, making an opening between their platforms of several feet. The coupling apparatus was automatical, such as is in general use, and, so far as appears, well approved. There was no defect in it or in the engine or train, in their equipment, in any respect. It appears that the coupling process requires for its completion a certain force in making the contact; that it is not always accomplished at the first attempt; and that it is more difficult to do it when, as was in this instance, the train is on a curve of the road. The failure to make the coupling when the draw-heads first were brought in contact was not, nor was the gap between them, which followed it, occasioned by any negligence of the defendant.

The question, therefore, arises whether the plaintiff's injury was caused by any fault of its employes. The relation of passenger and carrier between the plaintiff and defendant commenced when she went onto its premises and purchased her ticket for the purpose of taking the train, and the defendant assumed the duty of reasonable care for her protection while proceeding to take the train. This, however, gave to her no right to enter a car before it was attached to the train. The plaintiff evidently supposed when the cars came together that they were coupled, and the empty one ready to receive passengers. This was the appearance which the shock of the contact gave. At that time the adjacent platform of the next car back of it was fully occupied with passengers ready to enter. The plaintiff was in the rear of them, and standing just inside the car. The defendant's employes were in a situation to see whether the coupling was complete; and with them was the duty, if it was not so, of informing the passengers, and requesting or directing them to wait until it was done. This those

employees testify they did do by distinctly telling them to keep back, to stand back off the platform, and that this was repeated. If this were so, and nothing further occurred to induce the passengers to go forward when they did, and when the plaintiff sought to do so, it would be difficult to find any support for the charge of negligence against the defendant. But there is evidence tending to prove that at the moment the cars came together the conductor hallooed "All aboard," and that the plaintiff and those with her heard it; and that thereupon the passengers proceeded from the platform of the car, on which she was, to pass into that ahead of it, and she followed. The evidence of such announcement of the conductor was contradicted by his evidence, and that of the brakemen there. This question was one of fact for the jury; and finding, as it may now be assumed they did, that the conductor, simultaneously with the coming together of the cars, called out as before mentioned, the conclusion of the jury was permitted that it enabled the passengers to understand (unless they saw something to the contrary) that the car was ready for them to enter it. And it may have been treated as an invitation to do so; and as it was given prematurely, or before it was entirely safe to do so, it was the fault of the defendant's employe, which justified the imputation of negligence against the defendant. *Filer v. Railroad Co.*, 49 N. Y. 47; 59 N. Y. 351; 68 N. Y. 124; *Maher v. Railroad Co.*, 67 N. Y. 55. While such remark of the conductor may have been intended for those not on the train desiring to take it, it cannot, in view of the then circumstances, necessarily be treated as exclusively applicable to them. There was a large number of passengers in the car where the plaintiff was, and on its platform, waiting for the empty car, to obtain a seat in it. This was known to the conductor, and they, as well as those standing at the depot, were at liberty to understand that the call was intended for all who wished to enter it and procure a seat there. And this state of facts was entitled to consideration on the question of the contributory negligence of the plaintiff, so far as related to her movement from the position in which she then was, to get into the other car. When she heard this call of the conductor, she was warranted in supposing that the condition was such as to enable her to safely pass into the other car, for which she had been waiting to obtain a seat. In proceed-

ing to do so, she was not necessarily chargeable with negligence. *Bucher v. Railroad Co.*, 98 N. Y. 128. But her duty was to exercise care in going forward. If she saw the gap between the platforms, it was negligence for her to proceed; and, if she did not see the opening, the question is whether she, as matter of law, was chargeable with the want of care which she was called upon to exercise. It may be assumed that she did not see the difficulty. She says that she was looking at her brother-in-law, who had called for her to come into the car, and that as she was "about to take the step the car separated." That was all she remembered. It was just after dusk in the evening. The situation may not have been plainly visible. There had been a crowd of passengers on the car platform. They had gone into the other car, and were proceeding to do so and there were many to get on board at that station. The plaintiff was anxiously hastening, apprehensive that otherwise she might fail to get a seat. It is very likely that she neither apprehended danger from the cause which produced it, nor looked to see whether the platforms were so united as to permit passage from one to the other. She probably assumed, from what she had heard from the conductor, and seen in the movement of the passengers, that the way for passage was as safe as usual when cars are coupled. The plaintiff had on occasions before taken passage on trains running on the time of this one, and had the opportunity of seeing that the platforms of connected cars were not separated by a space at all dangerous to passage. In fact, it was about one inch in width when the cars were coupled. Mr. Russell testified that, as the plaintiff stepped forward, the cars separated, and she went down between them. There was other evidence that they separated immediately after the contact. At all events, her attention was not called to it, and she says no warning to keep back was heard by her, and her brother and brother-in-law say they heard none. The evidence that warning was given came from the employes whose duty it was to give it. The severance of the cars after they came together, and the movement of the plaintiff with others to cross into the other car, evidently occupied but a very short space of time. The plaintiff's excuse for proceeding as she did was in the announcement, "All aboard," which must now be assumed to have been given by an employe of the defendant. It may be inferred that relying upon that, and seeing others pass, she supposed

that it could be done in safety; and the jury were permitted to conclude that the plaintiff relied upon those evidences that the cars were coupled together, and was justified in proceeding as she did to pass from one into the other car without any apprehension of danger from the cause which produced it. *Tousey v. Roberts*, 114 N. Y. 312; 21 N. E. Rep'r, 399; *Brassell v. R. Co.*, 84 N. Y. 241.

The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment, or to use the wisest precaution. Some allowance may be made for the influences which ordinarily govern human action; and what would under some circumstances be a want of reasonable care might not be such under others. *McIntyre v. R. Co.*, 37 N. Y. 287; *Lowery v. Ry. Co.*, 99 N. Y. 158; 1 N. E. Rep'r, 608; *Sherry v. R. Co.*, 104 N. Y. 652; 10 N. E. Rep'r, 128. This question of negligence in the present case was for the jury, and, therefore, the motion to dismiss the complaint was properly denied. And there was no error in the refusal of the court to charge, as requested, that the plaintiff was bound to wait in the car, where she was in a safe place, until the coupling was complete. The consideration of this proposition is embraced in what has already been said. The exercise of due care required her to wait until she was induced by what an employe announced, and by it was permitted to suppose, and did believe, that the cars were so coupled. The court had charged the jury quite fully upon that subject, and the question was submitted to them whether the plaintiff was chargeable in any respect with negligence in proceeding when and as she did to pass from the car in which she was to the other one; and they were instructed that, if the plaintiff was not entirely free from negligence, she could not recover. The case was a close one, but the facts essential to a recovery by the plaintiff were not without evidence for their support. There seems to have been no error in any of the rulings to which exceptions were taken. The judgment should be affirmed.

All concur.

Hannibal & St. Joseph R. Co. v. Martin, 111 Ill. 219, is a very similar case to the foregoing, in which a judgment for the plaintiff was affirmed.

BARNES V. McMURTRY

(45 N. W. R. 285; — Neb. — .)

1. INSURANCE. PLEADING STATUTE OF LIMITATIONS. Where the facts upon which the statute of limitations is predicated do not appear in the petition, but such plea is interposed in the answer as a defense, the time when the statute began to run must be definitely stated; and the mere allegation that the action is barred is not sufficient.

2. LIMITATION IN POLICY OF INSURANCE, WHETHER VALID. To sustain a proviso in a contract that an action thereon must be brought within a time much less than that provided by the statute of limitations — as six months — there must be a consideration, unless it was within the contemplation of the parties when the contract was entered into; and this rule applies to a policy of insurance.

George E. Hibner for plaintiff in error. *Robert Ryan* for defendant in error.

MAXWELL, J. This is an action upon a policy of insurance. It is alleged in the petition that "the Lincoln Insurance Company, of Lincoln, Neb., is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska; that said corporation is insolvent, and that said J. H. McMurtry was duly appointed by the district court in and for the county of Lancaster and state of Nebraska as receiver for said corporation; that on the 28th day of February, 1887, Thomas L. Edwards and David J. Adams, under firm name of Edwards & Adams, were the owners of the following-described property, viz.: one frame building and additions, including boiler-house adjoining, situate on premises of assured at Carleton, Monroe county, Mich., occupied for manufacture of staves and heading and scale boards; also all fixed and movable machinery, shafting, gearing, belting, tools and apparatus, engines, force-pumps and connections, and boiler, iron smoke-stack and fixtures, contained therein; also all steam-boxes and steam-piping and fixtures contained therein; situate about ten feet north of the above-described building; and that said insurance company, on said day, in consideration of the sum of \$40 paid by said Edwards & Adams to said Lincoln Insurance Company as a premium, executed and delivered to said Edwards & Adams their policy of insurance, a copy of which is hereto attached, marked 'Exhibit A.' Plaintiff further alleges

that on the 9th day of August, 1887, said building and contents, as described in said policy, were totally destroyed by fire, and that said fire did not originate by any act, design or procurement on the part of said Edwards & Adams. That on the 10th day of September, 1887, said Edwards & Adams gave said Lincoln Insurance Company due notice and proof of said fire and loss, and has duly performed all the conditions of said policy of insurance. That said Edwards & Adams' loss by reason of said fire was as follows :

On first item in said policy.....	\$133 33
On second item of said policy.....	466 67
On third item of said policy.....	166 66
On fourth item of said policy.....	91 67
On fifth item of said policy.....	66 67
Total loss by reason of said fire.....	\$875 00

“That on the 5th day of May, 1888, said policy of insurance, together with all claims for damages on the same, and all the rights and interests thereunder belonging to said Edwards & Adams, was, for value received, duly sold, assigned and set over to this plaintiff. That no part of said sum of \$875 has been paid to said Edwards & Adams, nor to this plaintiff, and said defendant has refused to allow or pay the same, and there is now due to this plaintiff the sum of \$875, and interest thereon from the 10th day of November, 1887.”

The sixth and ninth clauses of the alleged conditions, printed in fine print in the policy, are as follows : “ In case of loss or damages by fire the assured shall forthwith give written notice thereof to the company, and shall use all practical means to save and protect property not destroyed, and within sixty days render an account of the loss, signed and sworn to, stating how the fire originated, giving copies of the written portions of all policies thereon, also the actual cash value and ownership of the property, and the occupation of the premises, and whenever required shall submit to examination under oath, by any person designated by the company, apart from all other persons except the attesting magistrate or notary, and subscribe thereto when reduced to writing, and produce all books of account, bills and other vouchers, or copies thereof, if

originals are lost, at the office of the company, and permit copies and extracts thereof to be made, and shall furnish plans and specifications of any building, fixtures or machinery destroyed, and shall, if required, produce the certificate of the magistrate or notary public nearest the place of the fire, stating that he has investigated the circumstances of the fire, and believes that the owner has, without fraud, sustained loss to amount claimed. When personal property is damaged the assured shall forthwith cause it to be put in order, separating the damaged from the undamaged, and shall furnish an inventory, naming the quantity, quality and actual cost of each article. In case of disagreement as to the amount of sound value of, or damage to, any property insured, the same shall, at the written request of either party, be determined by impartial arbitrators, one to be chosen by the company and one by the assured, the two so chosen to elect a third in case they cannot agree; and the report or award of two of them, to be made in writing and under oath, shall be conclusive as to the amount of such sound value and damage. The company reserves the right to take any appraised property at its appraised value, but there can be no abandonment to the company of property insured. Proofs of loss must in all cases be made by the owner of the property at the time of the fire. Loss or damage to property by the removal thereof, to protect it from fire, shall be borne by the company and the assured in the proportion that the amount of the policy bears to the value of the property. *Limitation Clause:* It is hereby covenanted and agreed that no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after an award shall have been obtained by arbitration in the manner herein provided, nor unless commenced within six months next ensuing after the fire, exclusive of any time consumed in arbitration.

To this petition the defendant filed an answer, as follows: "And now comes the defendant in above cause; and, for answer to the petition herein filed, this defendant says he admits that the averments of the first, second and third paragraphs of said petition are true, and admits that on September 10, 1887, said Lincoln Insurance Company received from Edwards & Adams due notice and proof of the alleged loss; that the amount of such loss was as stated in plaintiff's petition aforesaid, and that the right of

action therefor has been duly assigned and set over by Edwards & Adams; and that no part of the loss of \$875 has been paid. Defendant denies each allegation of plaintiff's petition not herein admitted. . For further answer, this defendant says that, as an essential part of the contract of insurance, it was stipulated therein in writing, and covenanted, as follows: '(9) It is hereby covenanted and agreed that no suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after an award shall have been obtained by arbitration in the manner herein provided, nor unless commenced within six months next ensuing after the fire, exclusive of any time consumed in arbitration.' This defendant says that, exclusive of any and all time consumed in arbitration, more than six months had elapsed from the date of the fire on account of which plaintiff, in his petition, asks a judgment, before a suit or action was brought for loss by reason of said fire, and that by the terms of the very written contract upon which plaintiff seeks a recovery, plaintiff's right of action has become fully barred by reason of the failure to bring suit within six months from the time the loss occurred, exclusive of time spent in arbitration." A demurrer was filed to the answer, and overruled, and the action dismissed, to which the plaintiff excepted, and now brings the case into this court on error.

1. It will be observed that the policy provides that, "in case of disagreement as to the amount of sound value or of damage to the property, the same shall, at the written request of either party, be determined by impartial arbitrators, whose report, * * * to be made under oath, shall be conclusive as to the amount of such sound value and damage." There is no allegation in the answer that proof of loss was accepted by the defendant as the true measure of damages, and that, therefore, there had been no arbitration. The inference from the answer is that there had been an arbitration by which the rights of the parties had been adjusted, but when this took place does not appear. The six months in which the action could be brought would not commence to run until an action could be brought, and certainly not until the lapse of sixty days after the service of the proof of loss. At the most, the answer states a mere conclusion, and not facts, and fails to show that the action is barred. In other words, where the facts upon which the statute of limitation is predicated do not appear

in the petition, but such plea is interposed in the answer as a defense, the time when the statute began to run must be definitely stated, and the mere allegation that the action is barred is not sufficient.

2. But the answer fails to state a defense for another reason. The provision limiting the time in which to bring an action on the policy is in these words: "Nor unless commenced within six months next ensuing after the fire, exclusive of any time consumed in arbitration." These words are in small type, and placed at the bottom of the ninth proviso. The most that can be claimed for these words is that they constitute a contract between the parties for a special limitation differing from, and much less than, the statute. But to support a contract there must be a consideration. If there was no consideration in support of the provision, it would be, like any other contract having no consideration to support it, a *nudum pactum*. If such a provision was in the contemplation of the parties when the application for insurance was made, or was in the application itself, then no doubt the original consideration paid for the insurance, and the policy issued thereon, would bind the insured; but a mere voluntary restriction, not in the application nor in the contemplation of the parties, placed in the policy as a proviso, in print too fine to be read by a person of middle age without spectacles, cannot be considered a part of the contract. Suppose A. should apply to B. for a loan of money, and B., believing A. to be an honest man, should send him the money with the request that he forward his note for the same; and suppose A. should send a note for the amount borrowed in proper form, but should write on the margin thereof that B. must bring an action on the note in six months after it became due, or be barred. Would such a proviso bar the action in less than the period fixed by statute? That it would not will be conceded. The contract, in such case, was for the loan of a certain amount of money, for a specified period, at lawful interest; and any provision restricting the right of recovery would be without consideration and void. So in case of insurance. A party who desires insurance on his property applies to an agent of some company in which he has confidence, and is furnished with a blank application to fill out, and does prepare the same, and deliver it to the agent, and pays the premium demanded. The premium

he has just paid is for the insurance, and he may reasonably suppose that, having paid the ordinary rates, the company, in case of loss, will pay the same promptly, after proof thereof is duly made. If it fails to do so, he may reasonably expect that the time to bring an action against the company is the same as upon any other written contract where there has been a breach thereof. A policy is issued, and, he believing the company to be honorable, and to have based its policy on the application, the policy is not read, but placed among his valuable papers; and only after a loss occurs is it examined. Every person familiar with the subject well knows that such is the ordinary course in very many cases, at least. If it is sought to interpose conditions or restrictions of this kind, they should be set forth in the application, or be brought to the attention of the insured when the premium is paid. Otherwise, unless there is a consideration shown for them, they will not be sustained. If it is said that the business of insurance is peculiar, and that it is necessary to try the cases as soon as possible after a loss occurs, so the proof may be available, the answer is that the insurer well knows that it may be called upon to make good the loss at any time after one occurs, and has the right and authority of any other litigant to take and perpetuate testimony; and there seems to be no good reason for an exception in favor of one company more than another.

In the many complex actions brought against railway, telegraph and other companies, where the defense largely depends upon the testimony of witnesses, it has never been seriously urged that such companies were entitled to a shorter limitation than other persons because of the liability of their witnesses to go away, or for other causes. It is the policy of the law to have but one law of limitations, alike for the poor and the rich, for the wealthy corporation and the insolvent; and, to establish a limitation by contract, there must be a sufficient consideration. Otherwise, it will not be available. In the very able exposition by Lord Mansfield in *Carter v. Boehm*, 3 Burrows, 1905, of statements made by the insured to obtain a policy, and their effect, the general rules governing the rights of the insured and insurer are considered at length; and an examination of the early cases will show that a special limitation within which the action should be brought in case of loss was a part of the original contract. Such a contract

was absolutely essential at that time, as the statute of limitations was held to be one of presumption that the debt was paid, and not, as at present, one of repose. Thus, in *Whitcomb v. Whitcomb*, 2 Doug. 652, decided by the same eminent judge several years later than the decision in *Carter v. Boehm*, it was held that an admission by one joint debtor was the admission of all, and that "the law raises a promise to pay when the debt is admitted to be due." When it is considered that a verbal admission or promise was sufficient to revive or continue the debt in force, the necessity for limiting the right of action by contract is apparent. None of these reasons exist in this state. Here the statute is one of repose, and a debt cannot be revived or continued in force except by an admission thereof, or promise in writing to pay the same. Mere lapse of time, therefore, in no case to exceed five years, will bar an action on a policy.

As this is the first time the questions under consideration have been presented to this court, we have made a careful examination of the reported cases, and have adopted such rule as to our minds seems best to comport with justice and fair dealing, and, therefore, hold that the answer wholly fails to state a defense.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

The other judges concur.

Insurance — limitation in policy. — See *Murdock v. Franklin Ins. Co.*, 1 Am. R. R. & Corp. Rep. 24; *Case v. Sun Ins. Co.*, ante; *Allemania Fire Ins. Co. v. Peck et al.*, post.

SHERMAN CENTER TOWN CO. v. MORRIS.

(23 Pac. R. 569; 43 Kans. 282.)

1. **CORPORATIONS. ESTOPPEL TO PLEAD ULTRA VIRES.** A corporation, which has enjoyed the benefit of a contract, cannot plead that it was *ultra vires*, where no fraud is intended or has been committed.

2. **EFFECT OF PROVISION IN ARTICLES OF ASSOCIATION LIMITING INDEBTEDNESS.** A provision in a charter of a private business corporation that "the indebtedness of the company shall not exceed \$500 at one time," must be regarded as merely a by-law, and, therefore, directory only. Such a provision will not annul a contract of which the corporation has enjoyed the benefit.

J. H. Sterling for plaintiff in error. *J. W. Lewis* for defendant in error.

HORTON, C. J. J. R. Morris recovered a judgment against the Sherman Center Town Company for \$1,304.85, with interest and costs. This judgment is complained of by the town company. The principal grounds of defense are that the written contract was not authorized by the board of directors of the town company, and also that it is *ultra vires*. The company is a corporation, organized under the laws of the state for "the purchase of lands, the surveying and platting of town-sites, selling lots and other lands." The charter also provides that "the indebtedness of the company shall not exceed \$500 at any time." The number of directors of the company were seven, and at the time of the execution of the contract D. G. Clark was the president, and Samuel J. Gandy the secretary. The contract related to the purchase of a stock of general merchandise, valued at \$1,904.22. It was executed in the name of the company, signed by its president and secretary, with the seal of the company attached. Before this action was brought, the contract had been fully complied with on the part of the seller, and all the purchase-price paid but \$1,304.22, the balance sued for. The case was tried before the court without a jury, and a general finding made in favor of Morris against the town company.

The rule is that a corporation has no powers except such as are granted or necessarily implied by its charter. If we could ascertain from the testimony that the town company had not received the benefit or proceeds of the merchandise purchased by its president and secretary, we would have no hesitation in saying that the plaintiff below was not entitled to recover. It does not appear from the charter that the corporation had any authority or power to engage in buying and selling general merchandise. It appears, however, from the testimony, that at the time the contract was executed the stock of merchandise was at Voltair, in Sherman county. After the contract was executed, and a part of the purchase-money paid, the merchandise was removed from Voltair to Sherman Center, where the business of the town company was carried on, and where a majority of the directors of the company reside. There is testimony tending to show that the company

sold the merchandise, and appropriated its proceeds to its own use and benefit. The town company did not show or offer to show that the president and secretary of the company purchased or received the merchandise for their own use and benefit or that they applied the proceeds to their own use and benefit. The general rule is that where a contract executed by a corporation is *ultra vires*, and the corporation receives the money or property paid upon such contract, the money or the value of the property may be recovered, to prevent injury resulting from the application of *ultra vires* upon a corporate contract, if no fraud is intended or has been committed. "After a corporation has enjoyed the benefit of a contract or other arrangement made in good faith with any of its regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company. Under these circumstances, the acquiescence of the shareholders may often be presumed." 2 Mor. Priv. Corp., § 632. While an executory contract made by a corporation without authority cannot be enforced, yet, where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. *Durham v. Mining Co.*, 22 Kans. 232; *Kennedy v. Bank*, 7 Neb. 59; *Rich v. Bank*, 7 Neb. 201; *University v. Martin*, 39 Kans. 750; 18 Pac. Rep'r, 941; *White v. Bank*, 22 Pick. 181; *Alleghany City v. McClurkan*, 14 Penn. St. 81. Where a contract results to the benefit of a corporation, very slight evidence of acquiescence or application will be sufficient to give it validity. *Getty v. Milling Co.*, 40 Kans. 281, 287; 19 Pac. Rep'r, 617.

We think that the limitation of \$500 in the charter of the corporation cannot be regarded of any more force than a by-law. The statute of the state provides that a charter of an ordinary private corporation shall set forth the amount of its capital stock, but does not require its indebtedness shall have other limit. The limitation, therefore, of \$500 is for the direction of the officers and agents of the corporation, and may be considered directory only. It does not annul the contract. "Where the corporation has had the benefit of an act performed by an agent in disregard of a mere formality, slight evidence will usually be sufficient to establish ratification by the shareholders, or an estoppel by reason

of laches." 2 Mor. Priv. Corp., § 634; Ang. & A. Corp., § 264; Bates v. Bank, 2 Ala. 462; Bond v. Bank, 2 Ga. 92.

The other alleged errors are not sufficiently material or important to comment upon. The judgment of the district court will be affirmed; all the justices concurring.

Estoppel of corporation to set up ultra vires with respect to contracts of which it has had the benefit.— We refer to the following cases on this subject in addition to those referred to in the foregoing opinion: Chicago Building Society v. Crowell, 65 Ill. 458; Bradley v. Bullard, 55 Ill. 418; Darst v. Gale, 83 Ill. 141; Ward v. Johnson, 95 Ill. 215; Peoria, etc., R. Co. v. Thompson, 103 Ill. 187; Thomas v. Citizens' Ry. Co., 104 Ill. 463; Parish v. Wheeler, 22 N. Y. 508; Bissell v. Michigan Southern, etc., R. Co., 22 N. Y. 258; DeGroff v. American Linen Thread Co., 21 N. Y. 124; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Kent v. Quicksilver Mining Co., 78 N. Y. 159; Hazelhurst v. Savannah, etc., R. Co., 43 Ga. 54; Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488; Monument National Bank v. Globe Works, 101 Mass. 57; Episcopal Charity Society v. Episcopal Church, 1 Pick. 378; Railway Co. v. McCarthy, 96 U. S. 267; San Antonio v. Mehaffy, 96 U. S. 312; Hitchcock v. Galveston, 96 U. S. 351; Gold Mining Co. v. National Bank, 96 U. S. 640; Daniels v. Tierney, 102 U. S. 415; Morris R. Co. v. Railroad Co., 29 N. J. Eq. 452; Texas Ry. Co. v. Gentry, 69 Tex. 625; Kitchen v. St. Louis, etc., R. Co., 69 Mo. 324; Rich v. State National Bank, 7 Neb. 209; Whitwell v. Warner, 20 Vt. 426; Noyes v. Rutland, etc., R. Co., 27 Vt. 110; State v. Smith, 48 Vt. 288; Sanderson v. Iron & Nail Co., 84 Ohio St. 442; Smith v. Hull, 11 C. B. 897; Port of London Ass. Co.'s Case, 5 De G., M. & G. 465; Anglo-Australian, etc., Co. v. British Provision, etc., Society, 3 Giff. 534.

WINTER V. BALDWIN ET AL.

(7 So. R. 734; 89 Ala. 483.)

1. NATIONAL BANKS. INSPECTION OF BOOKS BY STOCKHOLDERS. MANDAMUS. A statute of Alabama provides that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records and papers of the corporation, at reasonable and proper times." Held, to apply to national banks within the state, and that *mandamus* would lie to enforce the right.

2. The writ should issue against the officer having the custody of the books, and not against the corporation.

Winter & Winter for appellant. *Tompkins & Troy* for appellees.

SOMERVILLE, J. The statute declares the law of this state to be

that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records and papers of the corporation, at reasonable and proper times." Code 1886, § 1677. This statute is but a slight modification of the rule of the common law, and its construction is fully discussed in the case of *Foster v. White*, 86 Ala. 467; 6 South. Rep'r, 88. We there held that the purpose of the statute was to secure to the stockholder of every corporation the right generally to examine the books at all reasonable and proper times, and that, upon a denial to him of the exercise of this right, he was entitled to a *mandamus* upon an averment of facts which *prima facie* bring the applicant within the terms of the statute, and showing such denial. If the inspection is sought from improper motives, or for reasons which are insufficient to justify it, this was said to be a matter of defense not necessary to be negatived by the applicant, by way of anticipation, in his pleadings.

The present application is made by a stockholder in a national bank, and the main question raised is whether these institutions are entitled to the prerogative of being exempted from the operation of the above section of the Code. The decisions are numerous which hold that the states are restrained from legislating adversely to the interest of these banks, or discriminating unfavorably against them on the ground that they are authorized constitutional agencies of the federal government, appropriately designed to aid in the administration of the fiscal operations of the government. These decisions have reference chiefly to state laws evincing unfriendly discrimination in the exercise of the taxing power, the tendency of which was often to cripple their influence, and even destroy their very existence. *Pollard v. State*, 65 Ala. 628; *People v. Weaver*, 100 U. S. 539; *Cook Stocks* (2d ed.), § 571. There is nothing of a hostile or discriminating character in the operation of the statute under consideration. Its purpose is to place all stock corporations on precisely the same footing; to confer on the stockholders of each the right to know their financial condition; to ascertain whether they are being honestly and profitably conducted, or otherwise; and to keep a supervision over all the details of management which can in any way affect the value of the stock, including the good fame and financial integrity of the institution. The statute unquestionably applies to

banks incorporated by the states. We see no reason why it should not also apply to national banks.

The principle is enunciated in general terms by the United States supreme court in *Waite v. Dowley*, 94 U. S. 527, as follows: "We have more than once held in this court," says Mr. Justice Miller, "that the national banks organized under the acts of congress are subject to state legislation, except where such legislation is in conflict with some act of congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation." It was decided in that case that a statute of the state of Vermont was valid which required the cashiers of national banks in that state to transmit to clerks of the several towns a list of the shareholders, with the number of their shares, for the purpose of taxation. The same doctrine had, in effect, been previously announced in the case of *Bank v. Com.*, 9 Wall. 353, where a statute of the state of Kentucky required "the cashier of a bank whose stock is taxed to pay into the treasury the amount of the tax due. If not, he was to be held liable for the same, with twenty per cent upon the amount." The tax itself was authorized by the act of congress, but the state law undertook to regulate the mode of its assessment and collection, by obliging the cashier to collect the tax out of the dividends, and pay it over to the state. The objection was taken that a state could not thus interfere with national banks by interposing such a duty on their officers; but the United States supreme court held the law to be a valid exercise of state legislative power, and free from constitutional objection.

We can see nothing in the right conferred on a stockholder to inspect the books of a national bank which in any manner tends to impair or destroy the utility of such banks as fiscal agents of the federal government, or which interferes with the purposes for which they were created. Nor can we see any thing in the laws of congress which, even by implication, forbids the exercise of such a right by stockholders. These laws, it is true, authorize the appointment of bank examiners by the comptroller of the currency, and provide that these institutions shall not be subject to any visitatorial powers other than those which are authorized by congress, or "vested in the courts of justice." R. S. U. S., §§ 5240,

5241. But these provisions were not intended, in our opinion, to curtail, or even to regulate, the rights of stockholders, or their relations toward the bank. An act of congress will not be construed to take away the jurisdiction of state courts, or to remove any favored persons or institutions from the equal operation of state laws, unless the purpose to accomplish this result is unambiguously expressed or implied by necessary intendment. *Cook v. Bank*, 52 N. Y. 96. It was accordingly held in *Bank v. Gunst*, 1 Abb. N. C. 292 (1876), that a national bank organized under the act of congress, which was decided to be a foreign corporation, was subject to a general statute of New York requiring foreign corporations to give security for payment of costs before instituting a suit in a state court. That decision was made by the New York superior court, but no appeal was taken from it. See, also, 2 *Morse Banks* (3d ed.), § 157, p. 1294; Gould & T. *Notes Revised Statutes U. S.* 961, 962. We accordingly hold that a national bank is subject to the influence of section 1677 of the Code of Alabama equally with all other corporations.

The writ, however, must issue against the cashier of the bank, or other officer having the custody of the books; and it does not run against the corporation as such, unless to compel the discharge of some corporate duty. The bank, in its corporate capacity, was not a proper party defendant to this proceeding. *Wood Mand.* 23, 29, 30; *Mos. Mand.* 199; *People v. Throop*, 12 *Wend.* 183; *People v. Mott*, 1 *How. Pr.* 247; *Ang. & A. Corp.* (11th ed.), § 707.

Reversed and remanded.

Clopton, J., dissents, holding that section 1677 of the Code was not intended and does not apply to associations incorporated under the National Bank Act of congress; the relative right of the shareholders, and duties of the officers to them, not being proper subjects of state legislation.

See *Hemingway v. Hemingway*, ante, and note.

CENTRAL UNION TELEPHONE CO. v. STATE EX REL., ETC.

(24 N. E. R. 215; 123 Ind. 118.)

1. TELEPHONE COMPANIES. DUTIES. MANDAMUS. Under the laws of Indiana a telephone company may be compelled by *mandamus* to furnish an instrument and telephcne service upon demand and tender of the statutory compensation.

A. A. Thomas and *Baker & Defrees* for appellant. *Jas. A. Thornton*, *J. H. Orr* and *John H. Bradley* for appellees.

COFFEY,*J. This was a suit by the relators against the appellant for the purpose of compelling the appellant to furnish the relators the use of telephones. The complaint alleges substantially that the appellant is a corporation duly organized and doing business under the laws of this state, as a common carrier of telephonic messages in Michigan City, and has done business therein for the period of four years last past, during all of which time it has and now does keep and maintain in said city a telephone exchange for the use and benefit of the public and individuals therein, leases telephonic machines or instruments, grants telephonic facilities, including needful and necessary connections that subscribers and others may reasonably require and demand; that relators are residents of Michigan City, in said county, engaged in the wholesale and retail lumber business, and managing a planing-mill in connection therewith, and that until about July 1, 1887, the appellant had leased them instruments, granted them telephonic facilities and connections at their mill and one at their office, since and during the time said appellant had established its business in said city, the relators complying with all conditions imposed upon them; that about the 1st day of July, 1887, the appellant, without cause, and against the protest of the relators, removed the said instruments from the mill and office of relators, severed all telephone connections, and refused to allow or grant them any telephonic service, though appellant did then, and ever since has, maintained and kept a telephone exchange in Michigan City, leased instruments and furnishes telephonic facilities for the public and individuals; that about July 14, 1887, the relators demanded of the appellant, which was then and there organized, existing and doing business as a carrier as aforesaid, the use,

possession and enjoyment of two telephones, one at their office and one at their mill in said city, and necessary connection with other subscribers and firms therein, and offered then and there to pay the appellant, as rent or for the use of the same, the sum fixed by law, to-wit, \$2.50 per month for each instrument, which demand and offer the appellant refused to accept or comply with, and refused said telephones and telephonic service, and still refuses the same; that the use of telephonic service to the relators in their business is of great value, as well as convenience, and they are without power to compel the appellants to grant them the telephone facilities they need, and which it is the duty of appellant to give the relators; and that the injury and damage to them caused by the neglect and refusal of the appellant to perform its duties and obligations cannot be estimated so as to give any exact amount, or lay the foundation for a suit at law for damages. The complaint prays that the appellant be compelled, by mandate, to furnish relators the required telephonic service. The court overruled a demurrer to the petition and alternative writ of mandate, and appellant accepted.

The appellant answered, denying that it was a common carrier, but admitting that its business was in some respects of the nature of a common carrier, and that it was a *quasi* public corporation carrying on a telephone business in the said city, and so bound to furnish, under such reasonable rules and regulations as it might establish, telephone service to all persons impartially, and without discrimination, so far as is practicable, but denying that it is bound to rent telephones at all, or as demanded by the relators, or for any fixed monthly rental, or for the exclusive use of any one; that it has not, since the 30th day of June, 1887, done so, nor does it now do so to any person in Michigan City; that after long trial and full experiment it found it could not rent telephones, with exchange service, at the price fixed by statute therefor, and for the compensation so received pay the expenses of so doing, and the royalties on the patents required therefor, and necessary repairs and renewals, and make any reasonable return on the capital invested in such attempts, and that it duly notified all of its subscribers in Michigan City that on and after June 30, 1887, it would not attempt longer to do so, but would, on and after said date, close its exchange and cease business in said city, unless a

sufficient number of citizens therein should desire telephonic service, without any rental of instruments, and by means and use of a central toll station connected with local toll stations alone, whereat all practicable telephone connections might be furnished by appellant, and had and enjoyed by all persons, without partiality or discrimination, on payment of a toll charge or payment for each communication; that under said system coupons or a number of tickets would be sold for a greatly reduced price, which tickets should be good only if used within a limited time, and were good for use, not on any particular instrument, but on all telephones connected with said exchange, or any other of the many exchanges of the appellant in adjoining cities, or in said state of Indiana; that under said system telephones for such toll stations are established at such desirable points as the telephone company may select, where responsible parties are found to act as agents of appellant in said business, under contracts of agency; that where such stations are not found to be sufficiently profitable they are to be discontinued, but that in establishing the same appellant requires that such coupon tickets, good as aforesaid, shall be purchased through the agent, in order to have assurance that such station will have business enough to justify maintaining it; that all said persons mentioned in said complaint, as having in said Michigan City telephone instruments in their possession, have them as agents of the appellant, under said system and contracts, and in no other way; that since the 30th day of June, 1887, the telephone business of appellant has been and is conducted under said system, and in no other way; that appellant offered to establish such toll stations upon relators' said premises, to be operated and carried on the same as others, but relators refused the same, or to sign said contract therefor. To this answer the court sustained a demurrer, and, the appellant failing to answer further, the relators had judgment. The assignment of errors calls in question the rulings of the circuit court as above set out. The case of Telephone Co. v. State, 118 Ind. 194; 19 N. E. Rep'r, 604, and authorities there cited, is decisive of the case now before us. In that case it was held that, under the laws of this state, a person desiring the kind of telephone service here required could compel, by mandate, the furnishing of such service, and that it was no defense to say that the person or corporation engaged in furnish-

ing telephonic service did not rent telephones, but furnished such service by means of public stations only.

Judgment affirmed.

Regulating charges of telephone companies.— In *Central Union Tel. Co. v. State*, 118 Ind. 194, the points decided as stated in the syllabus are given below with the authorities cited in support of same, in the opinion of the court.

1. The telephone is an instrument of commerce, and persons or corporations engaged in the general telephone business are common carriers of news.

2. A person or corporation engaged in operating telephone lines, furnishing connections, facilities and service to business houses, persons and companies, can be compelled by mandate on the petition of one discriminated against, to furnish to such a one the same service that it furnishes to others, independent of any statutory provision against discrimination. *State v. Nebraska Tel. Co.*, 17 Neb. 126; *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33; *People v. Manhattan Gas-light Co.*, 45 Barb. 186.

3. A company doing a general telephone business in this state cannot evade the acts of April 8 and April 18, 1885 (Acts 1885, pp. 151, 227), prescribing the duties of such companies and regulating the rental to be charged for the use of telephones, by ceasing to do a rental business and establishing public toll stations, but under such acts any person, within the local limits of the business of such company in a town or city, has the right to demand and receive a telephone, with connections, facilities and service, at the rate per month fixed therein.

4. The acts of 1885, relating to railroad companies, apply merely to the service to be provided to persons within this state, and they are, therefore, not open to the objection that they are void as attempting to regulate interstate commerce, although the lines of a company doing business in this state may be extended into other states.

5. The fact that the statute prescribes a penalty for the violation of its provisions, does not abridge the right of an aggrieved party to compel the telephone company by *mandamus*, to furnish him with service to which he is entitled. *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *State v. Telephone Co.*, 36 Ohio St. 296; *Bell Tel. Co. v. Commonwealth (Penn.)*, 8 Atl. Rep'r, 825.

6. In an action by a resident of a city to compel a telephone company to furnish him with telephonic service within such city, an answer that the line of the company extends outside of the state, and that by furnishing the plaintiff with an instrument and service he would be placed in communication with points outside of the state, is bad.

MATHER V. EUREKA MOWER CO.

(33 N. E. R. 923; 118 N. Y. 629.)

1. CORPORATIONS. TREASURER. CLAIM FOR COMPENSATION. Where a stockholder of a corporation is appointed to, and fills the position of, treasurer, without any agreement or understanding as to compensation for his services, the law will presume that the service was intended to be gratuitous and no recovery can be had therefor.

2. This presumption will not be dependent upon the amount of stock held by such person.

3. PRACTICE. REFUSAL TO PRODUCE BOOKS AND PAPERS. Where a defendant has refused to produce books and papers upon proper notice, and the plaintiff has given secondary evidence of their contents, the defendant will not then be permitted either to produce the books and papers, or to give oral evidence thereof, to meet such secondary evidence.

John W. Boyle for appellant. *H. J. Cookinham* for respondent.

BRADLEY, J. The plaintiff was the first treasurer of the defendant, a manufacturing corporation, and was appointed as such in April, 1884, entered into actual service in July following, and served about ten months. He sought by this action to recover compensation to which he claimed he was entitled. The referee found that the plaintiff's services were performed without any expectation on his part, or any agreement or understanding, that he should receive compensation, and that they were intended to be gratuitous. And, as conclusion of law, the referee determined that the plaintiff was not entitled to recover any sum for his services as treasurer, but allowed to him \$75 for clerical services of another employed by him as book-keeper. The value of the plaintiff's services was found by the referee to have been \$300. The main question, upon the merits, is whether the conclusion that there was no agreement, expressed or implied, to support the plaintiff's alleged claim, was warranted by the evidence.

The fact that the plaintiff was appointed or employed as treasurer by the defendant, and that he performed beneficial services for the defendant, presumptively entitled him to payment of their value. *Smith v. Railroad Co.*, 102 N. Y. 190; 6 N. E. Rep'r, 397. And when that appeared the burden was with the defendant to relieve itself from liability. This it sought to do by mak-

ing it appear that the plaintiff was a stockholder of the defendant; that he was a member of the banking firm of A. D. Mather & Co., composed of himself and another, who was also a stockholder, and one of the trustees, of the defendant; and that it was understood that such firm should have the banking business of the defendant. The further fact appeared that by a by-law of the defendant the power was given to the board of trustees to fix the compensation of its officers; and, while that of secretary was so fixed, no compensation for the treasurer was designated, and no provision made by the board in that respect. It is well settled that a director of a corporation is not entitled to compensation for services performed by him as such, without the aid of a pre-existing provision expressly giving the right to it. They are the trustees for the stockholders, and as such have the management of the corporate affairs; and to permit them to assert claims for services performed, and then support them by resolution, would enable the directors to unduly appropriate the fruits of corporate enterprise. It would clearly be contrary to sound policy. The same reason may not exist for the application of the rule to a stockholder, not a director, who has become an officer of the corporation. But he has a pecuniary interest in its management and business; and, when he assumes the duties of the office, and performs them, without some agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he performs the official services gratuitously. This proposition cannot be made dependent upon the proportionate amount of the stock held by him. If the officer expects to have compensation, and the corporation intends to pay him for his official services, it may easily be provided for, by resolution or agreement, before he enters upon his services. This is, at all events, a salutary rule, as applied to an officer who is a stockholder of the corporation. *Loan Ass'n v. Stonemetz*, 29 Penn. St. 534; *Kilpatrick v. Bridge Co.*, 49 Penn. St. 118; *Smith v. Putnam*, 61 N. H. 632; *Gill v. Cab Co.*, 1 N. Y. Supp. 202; *Barril v. Water-Proofing Co.*, 2 N. Y. Supp. 758. In such case, there may be presumed to exist a reason, in the fact of such relation and interest, to induce him to assume and exercise the duties of the trust not dependent upon compensation for services, when nothing appears to the contrary. The plaintiff had the re-

lation of stockholder ; and, in addition to his interest as such in the corporation, he had a further interest, as banker, in having the benefit, such as it might be, of doing the banking business which the company might furnish. In view of those considerations, and the further fact that he accepted the office, and performed its duties, without any express understanding that he should have compensation, the referee was permitted to conclude, as he did, that the plaintiff accepted the office of treasurer without any view to compensation, and performed the services gratuitously. The conflict of evidence bearing upon that subject was disposed of in the court below, and can have no consideration on this review. In *Smith v. Railroad Co.*, the plaintiff, who performed the duties of secretary of the defendant, was neither a stockholder nor director of the defendant, and, as the court there remarked, stood in no relation to the company which made it his interest to serve it without compensation. In the present case, several exceptions were taken to the reception of evidence. After the defendant had declined to furnish the books and papers called for by the notice of the plaintiff to produce them, the defendant could not properly be permitted to introduce them as evidence in its own behalf to meet the secondary evidence of the plaintiff as to their contents, or to give oral evidence to that effect for such purpose. *Bogart v. Brown*, 5 Pick. 18 ; *Tyng v. United States, etc., Co.*, 1 Hun, 161. The evidence given by the defendant, having relation to what appeared in the books and papers embraced in the notice to produce, did not tend to contradict the evidence on the part of the plaintiff in any material respect ; and no harm could have in any manner resulted from it to the plaintiff. All the exceptions have been carefully examined, and none of them seem to point to any error prejudicial to the plaintiff. The judgment should be affirmed.

All concur, Vann, J., in result. Follett, C. J., not sitting.

PEEL V. CITY OF ATLANTA.

(11 S. E. R. 582; — Ga. —.)

1. EMINENT DOMAIN. LAYING OUT STREET ADJACENT TO LAND. DAMAGES. The defendant city purchased land adjacent to the plaintiff's lot, and laid it out as a street. She sued for damages by reason of being deprived of privacy and rendered liable for assessments. Held, that the plaintiff's land was neither taken nor damaged within the meaning of the constitution, and a judgment for the defendant was affirmed.

George S. Thomas for plaintiff in error. *J. B. Goodwin* and *J. A. Anderson* for defendant in error.

BLANDFORD, J. This was an action brought by Lucy Peel against the city of Atlanta to recover damages for alleged injury to certain property of hers. Her declaration alleged that she was the owner of a certain tract of land in the city of Atlanta; that she sold a portion thereof lying on Harris street to one Nix, who sold the same to the city of Atlanta, and, after the city bought the said lot, it opened a public street on said lot adjoining the balance of her land, thereby making the remaining portion of her land to be bounded on three sides by three public streets of the city, rendering it ungainly and unsightly to the public, and depriving it of all privacy; that the city had filled up a well on the portion that was sold, which her tenants had the right to use; and that she had reason to fear assessments upon all three sides of her lot for improvements in the way of sidewalks and streets. It is not alleged in the declaration that the defendant invaded her property in any way, or any right or use of hers therein, but she alleges that it was diminished in value by reason of public improvements made in the vicinity.

Upon demurrer to this declaration, the court held that it set forth no cause of action, and dismissed the same; and this is the case presented for our consideration. We think the true rule is that where property is taken, or where it is damaged, for the public use, by an invasion of the right of the property-holder as to its use or enjoyment, and the property thereby becomes diminished in value, an action may be maintained by the owner of such property to recover for the damages thus incurred. But we are inclined to think that where there has been no invasion of any right

or use of private property by the public, by the erection or laying out or building of any sewers, public highways, streets or pavements, no action can be maintained by the owner of adjacent land to recover for any damages that may be suffered in consequence thereof. If this highway or street had been opened or dedicated by Nix to the use of the public upon the land which she sold to the city, and such act on the part of a private owner was no invasion of any right, use or enjoyment in the property of an adjacent owner, no action would result to the latter thereby; and in this respect the city occupies as high a position as a private person, where it puts an improvement upon its own land. The constitution of this state (Code, § 5024), declares: "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." The same provision is in the constitutions of Illinois and Missouri, and of other states. *Lewis Em. Dom.*, § 221. The English statute, which has the same purpose as these constitutional provisions, uses the term "injuriously affected." Some statutes on the same subject used the word "injured." All these terms are believed to be equivalent in meaning and extent. *Id.*, § 222. The effect of such provisions is not to authorize compensation in all cases where property may be injured by public works, but only where the enjoyment of some right of the plaintiff in reference to his property is interfered with, and the property thereby rendered less valuable. The test is, would the injury, if caused by a private person without authority of statute, give the plaintiff a cause of action against such person?

If so, then he is entitled to compensation notwithstanding the statute which legalizes the damaging work. The constitutional or statutory provision simply prevents the defendant from shielding himself under legislative authority against liability for damages consequent upon the work. Hence, if no part of the plaintiff's land is taken, and no other right of his is disturbed, he cannot have compensation. *Lewis Em. Dom.*, §§ 235, 236; *Queen v. Board*, 3 Best & S. 710; *Ricket v. Ry. Co.*, L. R., 2 H. L. 175; *Rude v. City of St. Louis*, 93 Mo. 408; 6 S. W. Rep'r, 257; *Chamberlain v. Ry. Co.*, 31 L. J. (Q. B.) 201; *Rigney v. City of Chicago*, 102 Ill. 64. Where no land of the plaintiff is taken, and no other right infringed, he is not entitled to compensation on the ground that the privacy of his residence is destroyed. In

re Penny, 26 L. J. (Q. B.) 225. The fear of being assessed is a mere apprehension not yet realized, and cannot sustain a claim for damages. Besides, it seems that one who is delinquent, as this plaintiff promises to be, in the payment of assessments, cannot save his or her property from sale to get payment for the improvements put there by the city under the constitutional provision invoked by this declaration. That provision refers to the exercise of the right of eminent domain, and not to the enforcement of lawful assessments. *White v. People*, 94 Ill. 604. It follows that the court did not err in sustaining the demurrer to the declaration.

Judgment affirmed.

Eminent domain — highways laid out adjacent to but not taking one's land.—"Where a highway is laid out alongside of a person's land, but without taking any of it, it is held that he is not entitled to compensation, although the duty of maintaining the whole fence on his front is cast upon him, when before that he was only obliged to maintain half. *Hoag v. Switzer*, 61 Ill. 294; *People v. Supervisors of Oneida County*, 19 Wend. 102; *Kennett's Petition*, 24 N. H. 189. All the authorities are one way upon this question, but their correctness is unquestionable. Where by law the burden of maintaining a division fence is cast equally upon adjoining proprietors, there are mutual rights and obligations attached to the respective estates. Each has a right to compel the other to contribute his proportion. This right is appurtenant to the estate, for it passes with it. Likewise the obligation. When the adjoining estate is taken for a highway, that right is taken with it, and compensation to the extent of the loss should be made." *Lewis Em. Dom.*, § 148.

CHICAGO, ETC., RY. CO. V. PORTER.

(46 N. W. R. 75; 43 Minn. 527.)

1. **EMINENT DOMAIN. RAILROAD SWITCH IN STREET, ORDINANCE FOR.** An ordinance of the city of Winona, held to be sufficient consent on the part of the common council to the laying of a certain railroad switch track in that city.

2. **SWITCH TRACK. WHETHER A PUBLIC USE.** Whether the use for which lands for the construction of a railroad track are to be taken in a public or private use does not depend on the number of persons who may have occasion to use it. If all people have a right to its use, it is a public use, though the number who require the use may be small.

3. **PROOF OF INCORPORATION.** Upon the hearing under section 17, chapter 84, General Statutes, 1878, as amended by section 1, chapter 85, Laws 1879, of

a petition for the appointment of commissioners to determine the compensation for taking lands for railroad purposes, it is for the petitioner to prove its incorporation.

Wilson & Bowers for appellant. *Gale & Brown* for respondent.

GILFILLAN, C. J. This is an appeal from an order made on the application of the plaintiff, appointing commissioners to appraise the damages to be paid by it for taking private property for public use for the purpose of constructing a switch track in the city of Winona, from its main track, along a line described in its petition to the manufacturing establishments of the Laird-Norton Company. The proposed switch line runs partly upon a public alley and partly upon private property, and crosses at least one public street. The defendants, owners of land proposed to be taken, appeared before the district court to which the application was made, and opposed it, and, after a hearing, the court granted the application, and defendants appeal. The assignments of error make three points, all of which we will consider, though not in the order in which they are stated in the assignments: First. The city of Winona did not authorize the petitioner to construct, operate or maintain such line. Second. The proposed condemnation is not for a public use, but for a private use, and no public necessity is shown for it. Third. The evidence does not show that the petitioner is a corporation, or that it is authorized by law to construct, maintain or operate any railroad in this state.

The charter of the city of Winona (chap. 20, Sp. Laws 1867) gives the common council (§ 2, subchap. 4) authority, "by ordinances, resolutions or by-laws," among other things, "to direct and control the location of railroad tracks." Subdivision 24. August 2, 1886, the common council passed an ordinance granting to the Chicago, Burlington and Northern Railroad Company authority to construct its main line through the city, and upon and across certain streets, describing the line, "and also, from time to time, to construct, operate and maintain, from its main track to commercial and manufacturing establishments and yards northward from said main track, situate within seven hundred feet of its main line, such side tracks and switch tracks as such commercial and industrial interests may require." Section 3 of the ordinance

prescribes regulations as to width of tracks, and how to be laid with reference to the grade or surface, when laid in a street or alley, and as to the crossings at streets or alleys. The switch track here in question comes within the limits of that part of the ordinance quoted, and, so far as the right to lay it on the line proposed depended upon the consent of the council, the plaintiff had the right. But the ordinance could not have the effect of giving authority to construct a railroad or any part of a railroad, and for that purpose to take private property. That authority must be derived from the legislature. The power conferred by the charter on the council, "to direct and control the location of railroad tracks," does not include the power to authorize the constructing of railroads, and the exercise of the right of eminent domain. It merely vests in the council as part of its police power, to be exercised in providing for the public safety and convenience, in the use of streets and alleys, a supervision over the location of railroad tracks, where the authority to construct the railroad already exists, including the power to designate what streets and alleys may be laid upon. If the plaintiff had legislative authority to construct, maintain and operate a railroad with side and switch tracks, and to take private property for the purpose, it need look to the council for nothing more than consent to its locating its tracks upon particular streets and alleys, which, as we have seen, was granted.

The assignment of error that the condemnation is sought for a private, and not a public, use, is based on the fact that the switch track is to terminate at the Laird-Norton manufacturing establishments, and on defendant's claim that it is intended for the sole accommodation of the business of those establishments. Though it seems from the evidence that, at present at least, those establishments may be benefited by the switch track, more than any one else of the public, because they have more freights to ship upon it, the claim that it is intended for their sole accommodation is hardly sustained by the evidence. At any rate, so far as the question of public or private use depends on facts to be found from the evidence, the court below found them against the defendants, and that finding, as also the findings included in the order made, that the public interests require the construction of the switch track, and that the lands proposed to be taken are required and

necessary for the purpose, are conclusive, if fairly sustained by the evidence. The switch track, as the evidence shows, is to be part of a system of track, all belonging to the general enterprise of maintaining and operating a railroad for public use. The character of the use, in the case of a railroad or railroad track, does not depend on the amount of business, or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have a right to the use of it, it is a public use or interest, though the number who require its use may be small. *Kettle River R. Co. v. Eastern R. Co.*, 43 N. W. Rep'r, 469. There is nothing in the evidence to indicate that the Laird-Norton Company is to have any control over or management of the track in question, or to have any right in it, other than that of any person or corporation having business establishments along or near it, to-wit, the right to ship and receive freight upon it carried or to be carried over plaintiff's lines. It does not appear that there is to be any thing exclusive in its contemplated use. The assignment of error is not well founded.

As to the third assignment of error, as herein numbered. It is elementary that no one but the state can exercise the right of eminent domain, without showing a grant from the state of authority to exercise it. The statute has not granted authority to exercise it for railroad purposes, except to corporations created or organized for the purpose of constructing and operating railroads. Where an attempt is made to take private property for a railroad, due incorporation as a railroad company of the party seeking to take it must appear, either by proof or by presumption. The mode of taking is prescribed by chapter 34, General Statutes 1878, commencing with section 13. The hearing upon the application is regulated by section 17, as finally amended by section 1, chapter 35, Laws 1879. No pleading, unless the petition may be regarded as one, is required. The rule in section 112, chapter 66, General Statutes 1878, prescribing how a defendant shall put in issue the fact of plaintiff's incorporation, relates only to civil actions, and has no application to proceedings under section 17, chapter 34. Undoubtedly, any one opposing the proceeding may state his objections in writing, and, should he do so, would probably be limited to the objections thus stated, and be held to concede any thing not embraced in the objections. In this case the written objections

seem to cover every thing necessary to appear in order to justify the taking.

The question is, upon whom was the *onus* of proof upon the fact of incorporation? Was it for the petitioner to prove that it was incorporated, or for those opposing the application to prove the contrary? We see nothing in the terms of the section to indicate an intention that the petitioner shall come before the court with any presumption in favor of its right to the relief it seeks, either in respect to the fact of its incorporation, or as to the existence of any other condition necessary to appear before the relief can be granted. Nor is there any thing showing an intention to change the natural order of proofs as it exists almost universally in judicial proceedings. That order requires that one standing in the position of asserting and relying on the existence of a fact must prove the fact. In cases like this, there are strong reasons for adhering to, rather than departing from, that rule. The evidence as to the fact of incorporation, if there be any, is more peculiarly within the power of the petitioner than of those opposing the petition. Cases from New York are cited holding that, under the statute of that state, somewhat similar to section 17, the *onus* of proof as to the fact of incorporation is on the party opposing the application. There is, however, enough difference in the language of the two statutes to deprive those decisions of any weight as authority upon the interpretation of our statute. From the memorandum filed by the court below, we infer that its attention was not particularly called to the absence of evidence of the fact of incorporation. Because there was no such evidence, the order must be reversed, and a rehearing had on the issue of the corporate character of the petitioner as a railroad company, and if, upon such rehearing, the court below find such issue in favor of the petitioner, the order appointing commissioners to stand, otherwise to go for naught; the court below not being required to retry the other issues, but the order appealed from to stand unreversed so far as concerns the courts' findings on those issues.

GLAESSNER V. ANHEUSER-BUSCH BREWING ASS. ET AL.

S. W. R. 707; 100 Mo. 508.)

1. MUNICIPAL CORPORATION'S POWER TO AUTHORIZE USE OF STREETS FOR PRIVATE SWITCH TRACKS. This was a bill by an abutting owner to enjoin the construction and maintenance of private switch tracks upon and across certain public streets of St. Louis, to connect the defendant's brewery with the tracks of a railroad company. Held, that the city could not, under its general power, "to regulate the use" of the streets, grant authority to lay down tracks for private use; that the power to regulate was a trust to be exercised for the purpose of keeping the streets open and free for all, which would be violated by the proposed use.

2. WHO MAY MAINTAIN BILL TO ENJOIN SUCH USE. An abutting owner, whose property is situated within seventy-five feet of a proposed crossing and will be depreciated by the proposed tracks, and from whose premises travel and trade will be diverted, sustains special damages, entitling him to maintain a bill to enjoin the proposed and unlawful use of the streets.

James O. Broadhead for appellant. *Andrew M. Sullivan* for respondent.

BLACK, J. By the decree entered in this case the defendant the Anheuser-Busch Brewing Association, a corporation created under the law of this state, was enjoined from constructing and maintaining a single or double railroad switch track on, over or across Broadway, Seventh and Ninth streets, in the city of St. Louis; and the city, its mayor and other officers, were enjoined from delivering possession of the streets to the brewing association for such purposes. The pleadings and the proof disclose the following facts: The corporate authorities of the city passed an ordinance giving to the brewing association the right to lay down and operate, with steam or cable power, subject to all laws and ordinances then or thereafter passed in relation to the obstruction of public streets, a single or double railroad switch from its brewery to the Mississippi river, over and across Broadway, Seventh and Ninth streets. These streets run north and south, and the track is to be laid between Dorcas and Arsenal streets, which run east and west. Other provisions are made whereby the brewing association engages to protect the city against damages that may arise to persons or property by the construction and operation of the switch, and it is to be constructed under the supervision of the street commissioner. The ordinance also provides: "The said

Anheuser-Busch Brewing Association shall place and maintain upon each graded, guttered and paved street having sidewalks laid thereon, at the point across which the said railroad shall run, a gate, at each side of the said railroad track, of such character and dimensions as shall be approved by the street commissioner; and the said brewing association shall keep a watchman at all the street crossings where gates are required as aforesaid, both day and night, while cars are running over the said tracks, whose duty it shall be to see that the said gates are closed while trains or cars are crossing the said streets; and no cars shall be run or operated across any of the said streets between the hours of eight o'clock and nine o'clock in the forenoon, nor between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, nor between the hours of three o'clock and half past four o'clock in the afternoon of any day between the 1st day of September and the 1st day of July of the succeeding year, inclusive. * * * In no case shall cars be allowed to obstruct public travel on any street crossed by said tracks for a longer period than five minutes at any one time." The brewing association buildings occupy a large space of ground on the west side of Ninth street. The proposed switch tracks go east from the brewery over that street, then across Seventh and Broadway streets, and thence onto the river front, where they are connected with the tracks of the St. Louis, Iron Mountain and Southern railroad; the whole distance being about a quarter of a mile. By reason of a park and the Barracks to the east of Broadway street, a large travel going north and south is made to pass over Ninth, Seventh and Broadway streets, and the latter is the principal thoroughfare. The plaintiff owns improved property having a front of fifty-six feet on the west side of Broadway street, and in which he lives and carries on the business of a retail merchant of dry goods and notions. His property is seventy or seventy-five feet north of the proposed crossing of the track. The property on the street, on each side of the proposed crossing, is used for stores, shops, boarding-houses and residence purposes. The business of the brewing association is large, and it is estimated that the shipments of beer and receipts of material will average forty car-loads per day. Aside from the streets and alleys, the association owns the property on which it is proposed to build and operate the switch; and the first question is whether the city has

any authority in law to grant the right to construct and operate railroad switch tracks for private purposes across these streets. By article 3, section 26, paragraph 11, of the charter of the city of St. Louis, the city has power "to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter or repeal any such grant, in whole or in part, and to regulate and control the same, as to their fares, hours and frequency of trips, and the repair of their tracks, and the kind of their rails and vehicles." This provision of the charter applies only to railroads of a public character, and has no reference to railroad tracks constructed for private purposes only. Indeed, the defendant does not rely upon this paragraph of the charter for authority on the part of the city to grant the right claimed in this case; but reliance is placed upon that part of paragraph 2 of the same article and section which gives to the mayor and assembly power "to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof."

We have held that this power to regulate the use of streets is not limited to the mere right to regulate travel thereon, but under it the city may authorize the laying of gas, water and sewer-pipes, and all such like uses as the public good and convenience may require. The rights of the abutting property-owners must yield to all such new public uses. *Ferrenbach v. Turner*, 86 Mo. 416. And in the more recent case of *Association v. Bell Telephone Co.*, 88 Mo. 258, it was, among other things, in substance said that, when the public acquires a street, by condemnation, grant or dedication, it may be applied to all uses consistent with, and not subversive of, the use contemplated by the grant, dedication or condemnation. It was accordingly ruled that the erection of telephone poles was a proper use of the street; but the ruling is based upon the ground, and can stand on no other, that the use was a public one. The case furnishes no authority for the proposition that, under the general power to regulate the use of streets, the city may devote a street, or any part thereof, to private use. The logic and argument of the opinion is a refutation of any such power. The cases before cited are in perfect accord with *Belcher Sugar-Refining Co. v. St. Louis Grain El. Co.*, 82 Mo. 124, where it is held property acquired for public use cannot be appropriated to private use. "The latter," says the court,

"can no more be done than could the property in the first instance have been condemned for such use."

It has been held in a number of cases in this court that a steam railroad, built and operated upon a street in a city or town by legislative authority, is not a nuisance. *Porter v. Railroad Co.*, 33 Mo. 128; *Randle v. Railway Co.*, 65 Mo. 325; *Cross v. Railroad Co.*, 77 Mo. 318. But in all of these cases the railroad was a public corporation, and it was considered that the use of the streets for such purposes was not a perversion of the highway from the purposes for which it was dedicated. The question here is whether the city, under its general power to regulate the use of the streets, has the power to legalize the construction and operation of railroads thereon for private purposes only. On the question of such general power, it has been said: "The king cannot license the erection or commission of a nuisance, nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as porches extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings standing on the line of the streets." 2 Dill. Mun. Corp. (3d ed.), § 660. Under the general power, the city may determine to what extent the streets may be incumbered with building material, and there are many other necessary limitations upon the right of the public to an unobstructed way which are the proper subjects of municipal regulation. All these temporary obstructions are justified on the ground of necessity, and can be allowed on no other ground. Here, however, the city has attempted to devote the streets to a use which is unusual, is of a permanent character, and for a purpose which is purely private. Gates are to be placed at the crossings, and the ordinance prescribes other regulations, all designed to protect the public. But all the details show that the proposed use of the streets is no

ordinary one. That the public travel will and must be greatly obstructed is clear, and, if such an ordinance as this is to be upheld, there is no telling where such municipal legislation will end. The trust reposed in the city of St. Louis to regulate the use of the streets is for the purpose of keeping them open and free to all, and we can but conclude that the ordinance in question violates that trust, and is void. The city having no rightful authority to enact the ordinance, the switch tracks constructed thereunder on the public highway would be a public nuisance; and, in order for the plaintiff to maintain this injunction, he must show some special injury over and above the general injury to the general public. Some of the evidence offered by the defendant is that the construction of the switch will not decrease the value of the plaintiff's property. On the other hand, it is alleged and shown that plaintiff's property is within seventy-five feet of the proposed crossing, and the weight of the evidence is that these proposed crossings will have the effect to divert the travel to streets west of the brewery, and thereby decrease the value of the plaintiff's property, and take away some of the trade which he at this time enjoys. The evidence satisfied the trial court, and it satisfies us, that plaintiff will suffer an injury which entitles him to maintain this suit. The judgment is affirmed.

All concur.

Lateral railroads — spurs and switch tracks connecting private property with a public railroad.— The preceding two cases illustrate a right way and a wrong way of accomplishing substantially the same purpose. In the Missouri case private parties undertook to build a track of their own, to connect their establishment with a railroad. This they could not do on the public streets except for a public use and by permission of the public authorities. In the Minnesota case the construction of a similar road was undertaken by a railroad company, but the road when completed would be at the service of any who might desire to use it. Practically it might be used by only one establishment, but legally and theoretically it was open to the use of all.

Roads of the sort in question are deemed a public use if the public have a right to use them, though they may be in fact used by only a single person or establishment. *Harvey v. Thomas*, 10 Watts, 68; *Harvey v. Lloyd*, 8 Penn. St. 331; *Shoenberger v. Mulhallan*, 8 Penn. St. 134; *Hays v. Ricker*, 32 Penn. St. 169; *Brow v. Corey*, 43 Penn. St. 495; *Boyd v. Negley*, 40 Penn. St. 377; *Waddell's Appeal*, 84 Penn. St. 90; *New Central Coal Co. v. Gorges Creek Coal & Iron Co.*, 37 Md. 537; *Dietrich v. Murdock*, 49 Mo. 279; *Salt Co. v. Brown*, 7 W. Va. 191; *Phillips v. Watson*, 68 Iowa, 28; *DeCamp v. Hibernia Underground R. Co.*, 47 N. J. L. 43, 518.

In *Phillips v. Watson*, 63 Iowa, 28, the statute in question permitted the owner or lessee of lands having coal, stone or mineral thereon to condemn land for a "public way" to any highway or railroad, such owner or lessee to pay all damages and to construct and maintain the road. The act made no provision for the expenditure of public moneys thereon, and did not in any way define the rights of the public therein. The supreme court of the state held that the statute intended that the way should be for the use of the public, and so sustained the act. The court say: "We ought not to declare any act of the legislature void, if a construction can fairly be put upon it under which it can be sustained. In the title, as well as in the body of the act, the ways for the establishment of which it provides are prescribed as public ways, and the legislature must be presumed to have intended that they should be public ways, in the ordinary sense in which that term is used; that is, that the public should have the right to use, occupy and enjoy them as ways or roads. It is not material that the rights and privileges of the public with reference to them are not specially defined in the act, for the rights and privileges of the people generally with reference to public highways are defined in the general statutes on the subject. Neither is it material that no special provision is made in the act for the improvement of such ways, or for putting them in condition for public use at public cost. The authority for making such improvements could probably be found in the general statutes which govern the subject, if there should be occasion for its exercise. And we think that it makes no difference if the mine-owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small."

In Illinois it has been held that a railroad cannot condemn land for a spur track to a brick yard or coal mine, on the ground that such a taking would not be for a public purpose. *Chicago & Eastern Ill. R. Co. v. Wiltse*, 116 Ill. 449; *Sholl v. German Coal Co.*, 118 Ill. 427.

The question of public use cannot be determined by considering the number who are likely to be accommodated by the proposed work or improvement. If the use is open to all upon like conditions it is a public use, though it may be restricted to a particular locality, or may accommodate but one or two. *Bloomfield, etc., Natural Gas Co. v. Richardson*, 63 Barb. 437, 448; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. T. C. & D. R. Co.*, 2 Stew. & Por. 199; *Gilmer v. Lime Point*, 18 Cal. 229; *Coster v. Tide Water Mill Co.*, 18 N. J. Eq. 54; *O'Reilly v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Riche v. Bar Harbor Water Co.*, 75 Me. 91; *Talbott v. Hudson*, 16 Gray, 417, 425; *Ross v. Davis*, 97 Ind. 79; *McQuillen v. Hatton*, 42 Ohio St. 202; *Williams v. School District*, 33 Vt. 271; *Township Board v. Hackman*, 48 Mo. 243, 245.

A highway may be laid out though it will accommodate but a single family or place of business. *Lewis v. Washington*, 5 Gratt. 265; *Roberts v. Williams*, 15 Ark. 43; *Paine v. Leicester*, 22 Vt. 44; *Drake v. Clay, Sneed (Ky)*, 139; *Johnson v. Supervisors*, 61 Iowa, 89; *Pagels v. Oaks*, 64 Iowa, 198; *State v. Bishop*, 39 N. J. L. 226; *Masters v. McHolland*, 12 Kans. 17; *West Pike-*

land Road, 69 Penn. St. 471; Kissinger v. Hanselman, 33 Ind. 80. But see Fletcher's Heirs v. Furgate, 3 J. J. Marsh. 631; Knowles' Petition, 23 N. H. 361; Underwood v. Balley, 59 N. H. 480.

CITY COUNCIL OF MONTGOMERY V. MADDOX.

(7 So. R. 423; 89 Ala. 181.)

1. CONSTITUTIONAL LAW. CHANGE OF GRADE. The city of Montgomery cut down the grade of the street in front of plaintiff's property some ten or fifteen feet. The constitution of Alabama required corporations and others invested with the power of eminent domain to make compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements. Held, that the change of grade was "a construction or enlargement" of the highway within the meaning of the constitution.

2. MEASURE OF DAMAGES. It was further held that the plaintiff was entitled to recover to the extent that his property was depreciated in value by the improvement.

Jones & Falkner and W. S. Thorington for appellant. *T. H. Watts, Sr.*, for appellee.

SOMERVILLE, J. The action is one entirely analogous to that presented in *City Council of Montgomery v. Townsend*, 80 Ala. 489; 2 South. Rep'r, 155; 84 Ala. 478; 4 South. Rep'r, 780—which was before this court twice on appeal. The plaintiff in the suit claims damages for the injury done his property on Herron street, in the city of Montgomery, by reason of the grading and cutting down of the street and sidewalk contiguous to the property, which is alleged and proved to have been done by authority of the city council. The sidewalk was from ten to fifteen feet above the altitude of the street, and was cut down to the level of the street grade, but no excavation was made beyond the width of the highway as originally dedicated, more than fifty years ago. The defendant justified under its alleged power to grade the street and sidewalks, and its duty to keep them in repair, so as to make them safe for the passage of pedestrians and vehicles. It can scarcely be denied that the plaintiff's property has been injured or damaged by the change of the street grade, rendering it less accessible, less desirable as a place of residence, and appreciably diminishing its market value. The verdict

of the jury in favor of the plaintiff, for something over the sum of \$630, is conclusive on this point.

The only inquiry, as it seems to me, is whether the defendant municipality is to bear this loss ; or, if not, to what extent it is to be relieved of the burden, necessarily at the expense of the plaintiff. This question has been ably considered in the opinion of Chief Justice Stone and of Mr. Justice Clopton in the Case of Townsend, to which I have above alluded. With much in those opinions I fully agree, but, upon a more mature consideration of the authorities, I feel impelled to hold a modified view as to one or more of the conclusions there announced.

We are all agreed as to the old or common-law rule which prevailed in this state prior to the constitution of 1875, as to the liability of municipalities for grading and improving streets. Where they were invested with the authority to make such improvements, and did not exceed such authority, and there was no actual taking of the plaintiff's property in the exercise of the right of eminent domain, cities and towns were not liable for what are termed "consequential" damages, unless there was some negligence or want of skill in the execution of the work. Or, as stated by Mr. Freeman in his note to the case of Perry v. City of Worcester, 66 Am. Dec. 437: "Where an act is done by a city under authority of valid statute or charter, it is not liable for consequential damages to persons or property necessarily incidental to the work performed, unless the action is given by the statute, even when the same act, if done without legislative authority, would have been actionable. But the act must be performed with reasonable care, and without want of reasonable skill." This view is announced in Case of Townsend, 80 Ala. 491; 2 South. Rep'r, 155, and is well supported by the authorities. The reason is that the owner of the property must ordinarily be presumed to hold it subject to the paramount public right, and to the contingency of a diminution in value resulting from the exercise of the municipal right to improve the streets for the public good, "in any manner which shall not deprive him of property, nor disturb him in the lawful use of any thing which should of right be his." As said by Robertson, C. J. (Keasy v. City of Louisville, 4 Dana, 154): "It would have been *damnum absque injuria* — loss, not injury; inconvenience, not wrong — to which

every citizen must submit, and to something like which every citizen does submit, for the public good." The state held its highways in trust for the public use. It had the right to improve them, or to authorize their improvement through the agency of its municipalities, although such action for the public benefit might result in injury to the private property of the citizen. The prerogative of the state was to exempt itself from suit for damages consequential to the injury inflicted, and it was conceived proper, in the light of former experiences, that the same prerogative should be extended to its municipal agents employed to accomplish the same end. *Transportation Co. v. Chicago*, 99 U. S. 635.

This was a severe rule, full of hardships and injustice — that an act done under lawful authority, if done in a proper manner, would not subject the party doing it to an action, whatever the consequences might be, in the absence of any actual taking of the property of the injured party. It opened wide the door for the most monstrous invasions of the rights of the private property of the citizen under the authority conferred by legislature on corporations, especially municipal and railroad. The jurisprudence of every state in the Union furnishes unrighteous illustrations of private property injured by the construction of railroads, and damaged by municipal improvements made at the expense of the citizen for the public good. *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Murphy v. Chicago*, 29 Ill. 279; *Nevins v. City of Peoria*, 41 Ill. 502; *Mayor, etc., v. Omberg*, 28 Ga. 46; *Mills Em. Dom.* (2d ed.), §§ 204, 204a; 2 *Beach Ry. Law*, § 825; *Railroad Co. v. Marchant*, 119 Penn. St. 541; 13 *Atl. Rep'r*, 690; *Transportation Co. v. Chicago*, 99 U. S. 635.

There are two notable cases in the state of Pennsylvania which well illustrate the common-law rule above announced. As it seems to be conceded that the hardship of these cases — the want of a remedy for an admitted mischief — led to the incorporation in the Pennsylvania constitution of 1874 of a provision of which section 7, article 14, of our present constitution (of 1875), hereafter quoted, is an exact copy, I deem a particular reference to the decisions to be appropriate. In *O'Connor v. Pittsburgh*, 18 Penn. St. 187 (decided in 1851), the cutting down by the city of Pittsburgh of the grade of a street rendered entirely useless a church

building, which was shown to have cost about \$25,000, and practically destroyed its value as a place of worship. "The loss to the congregation," said the court, "is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable." It was stated by Chief Justice Gibson, that the case was reargued "in order to discover, if possible, some way to relieve the plaintiff consistently with law; but," he added, "I grieve to say we have discovered none." So in *Navigation Co. v. Coons*, 6 Watts & S. 101, where the defendant corporation constructed a dam in the Monongahela river under legislative license, which caused back-water for several miles in a tributary of that river and resulted in great damage to the plaintiff's mill, the court held the injury to be remediless because no portion of the plaintiff's property had been taken by the offending corporation, the damage being merely consequential.

The unjust distinction thus obtained at common law that one who was injured by the rightful exercise of eminent domain could not recover damages for such injury, however great, unless some portion of his property was actually taken. If the least portion of his property was taken, however, the owner could not only recover compensation for it, but also damages accruing to the remainder of such property. Where no property was "taken," the injury inflicted was held to be consequential damages, and compensation was disallowed, unless the offending corporation or party was made liable by force of its charter or some statute. "This was the mischief," says Chief Justice Paxson in *Railroad Co. v. Marchant*, 119 Penn. St. 541; 13 Atl. Rep'r, 690, alluding to the two cases above cited—"this was the mischief which the constitutional convention had before it when section 8 of article 16 [identical, as we have said, with section 7, article 14, of the Alabama constitution, now in force] was adopted by that body, and it was the evil the people were smarting under when they ratified the work of the convention at the polls. The constitution, since 1790, had declared that the property of the citizen should not be taken or applied to public use without just compensation. The constitution of 1874 went further, and declared not only that it shall not be taken, but, also, that it shall not be injured or

destroyed, by corporations in the construction or enlargement of their works, without making compensation, etc. There is no ambiguity in this language," continues the Pennsylvania court. "We have applied it several times to cases arising under it, without the least difficulty.

Keeping in mind the cardinal rule of construction, which has regard for the old law as it stood at the making of the act, the mischief for which that law did not provide, and the remedy provided to cure this mischief, it becomes the duty of the court so to construe the clause of the constitution under consideration as to suppress the mischief and advance the remedy. "Municipal and other corporations," says the constitution, "and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed, by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction." Const., art. 14, § 7.

I do not discover precisely this same language in the constitution of any other state, except those of Alabama and Pennsylvania. An analogous phrase, having in view the correction of the same evil, is found in the constitutions of Illinois, Missouri, Nebraska, Georgia, California and several other states, and provides that "private property shall not be taken or damaged for public use without just compensation." In Texas the language is "taken, damaged or destroyed for or applied to public use." Art. 1, § 17. These constitutions have generally been construed to so far change the common-law rule as to entitle the injured owner to compensation for any damage, whether direct or consequential done to private property for public use, and this without regard to any physical invasion or spoliation of the property so damaged. Mills Em. Dom. (2d ed.), § 204a, and cases cited. They are clearly designed as an extension of former provisions for the protection of private property. As observed by Thornton, J., in construing a similar clause in the constitution of California: "If it was not an additional guaranty to the common and usual one, its insertion was idle and unmeaning." *Reardon v. San Francisco*, 6 Pac. Rep'r, 317. The whole purpose in view seems to me to be that the party benefited — the public — shall bear the burden of making compensation for any private property taken or damaged

for public use. As the improvement is made for the common benefit, it is just that the public should pay for it, and not any particular individual be forced to bear the exclusive expense by the consequential depreciation in the value of his damaged property. *Harmon v. Omaha*, 17 Neb. 548; 23 N. W. Rep'r, 503; *Moore v. City of Atlanta*, 70 Ga. 611; *Jersey City v. R. Co.*, 40 N. J. Eq. 417; 2 Atl. Rep'r, 262; *City of Elgin v. Eaton*, 83 Ill. 535.

Under our constitution, the right of recovery in such cases is limited, of course, to property taken, injured or destroyed in a particular mode, viz.: "by the construction or enlargement" of the works, highways or improvements of the defendant corporation. It is generally conceded that provisions of this character are remedial in nature, giving damages where none before were allowed, and, therefore, that they should be liberally construed to effect their object. This was said in *Townsend's Case*, 80 Ala. 489; 2 South. Rep'r, 155, and is the settled doctrine in Pennsylvania. *Borough of New Brighton v. United Presbyterian Church*, 96 Penn. St. 331.

The supreme court of Pennsylvania have held that the word "injury" (or "injured"), as used in the constitution of that state, meant such a legal wrong as would be the subject of an action for damages at common law; or, using the language of Mr. Justice Paxson in a recent case, that the framers of the constitution "intended to give a remedy merely for legal wrongs, and not such injuries as were *damnum absque injuria*. Among the latter class of injuries," he adds, "are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence, and without malice." *Railroad Co. v. Marchant*, 119 Penn. St. 541; 13 Atl. Rep'r, 690. This conclusion has been severely criticized, and to my mind is of questionable correctness, but it is unnecessary for the purposes of this opinion to attempt to refute, or even to discuss, it. The critical examiner of the Pennsylvania decisions cannot fail to observe the embarrassment which has resulted from the attempt by that learned court to rescue some cases from the injustice of its logical application. The latest Pennsylvania case which we find reported, bearing on the construction of the clause under consideration, is *Railroad Co. v. Walsh*, 124 Penn. St. 544;

17 Atl. Rep'r, 186, and does not seem to follow the logical result of the definition affixed to the word "injury," as above stated. There a railroad had been constructed upon the public street of a town under authority of law, so near to a church edifice as to render it unfit and unsafe for use as a parsonage, church and school, for which it was and had been used, the frequent running of the trains destroying safe access to the property, and seriously interfering with the conduct of religious services, so as to greatly depreciate the value of the edifice. The injury was held to be the direct result of the construction, and to "stand upon the same footing as to consequential injuries as if it had been an actual taking of a portion of the plaintiffs' property."

A case more directly in point, for the purposes of the present decision, is *Borough of New Brighton v. United Presbyterian Church*, 96 Penn. St. 331, where a grade of a street was changed by order of the town authorities, and the church edifice of an abutting proprietor was injured by a depreciation in value in the nature of consequential damages, without any actual taking of the plaintiff's property. It was admitted that the plaintiff would have been remediless without the aid of the constitutional provision, and of a statute enacted to carry it into effect. To the argument that the municipality was not liable for damages for grading the street the first time, by reason of the rights incident to the original dedication, *Meur, J.*, said: "The proprietor dedicated the street to public use as the grade then existed. The defendant in error so accepted it, and erected a church edifice on the lot abutting thereon. Whether or when the authorities would change the grade was a matter of conjecture. A change from the natural grade is a change of grade, just as clearly as if changed from a grade previously made by the authorities. It is presumed to have been made for the public benefit; but, as is found, to the injury of private property. * * * When the borough accepted it [the street] she took it as it then was, in width, line, and grade. This statute giving compensation [in execution of the constitution] is remedial. It gives damages where before none could be recovered. It should receive a liberal construction to effect its objects." A judgment of the trial court was affirmed, holding the borough liable for the depreciated value of the property resulting incidentally from the grading or construction of the

street. There are many other decisions of the same court on analogous questions, an examination of which will throw light on the subject in hand. *County of Chester v. Brower*, 117 Penn. St. 647; 12 Atl. Rep'r, 577; *Railroad Co. v. Lippincott*, 116 Penn. St. 472; 9 Atl. Rep'r, 871; *Pusey v. City of Allegheny*, 98 Penn. St. 522; *City of Reading v. Althouse*, 93 Penn. St. 400; *Railroad Co. v. Duncan*, 111 Penn. St. 352; 5 Atl. Rep'r 742.

The authorities, we may add, make a distinction, in some cases, as to the liability of municipalities and other corporations to make compensation for the taking of streets and highways, where the fee of the street or highway is vested in the public on the one hand, and in the adjoining proprietor on the other. Whether any such distinction can be made, under our present constitution, where a depreciation in the citizen's property is caused by the construction or enlargement of municipal highways, we need not decide, as the facts of the present case authorize the inference that the plaintiff, Maddox, owned the fee of the street in question to the center. 2 Beach Ry. Law, §§ 810, 811; *Mills Em. Dom.* (2d ed.), §§ 203, 204; *Railroad Co. v. Williamson*, 45 Ark. 429; *Railway Co. v. Witherow*, 82 Ala. 190; 3 South. Rep'r, 23; *Protzman v. Railroad Co.*, 68 Am. Dec. 650; *Railroad Co. v. Marchant*, 13 Atl. Rep'r, 690; 33 Am. & Eng. R. Cas. 116, and note on page 140.

I have no difficulty, for myself, in reaching the conclusion that, under the provisions of our present constitution, if the contiguous proprietor of a house and lot is injured, in the sense of being damaged, by the grading of a street, in the mode exhibited by the evidence in this case, and this grading is done by the authority of the municipality, and by reason of this improvement the pecuniary value of such property is diminished, the owner is entitled to be compensated for the damages he has sustained. This rule has the advantage of being plain in meaning, and of easy application in practice. In harmonizes, moreover, in policy with that distinguishing feature of modern republican constitutions which has in view the protection of private rights and personal liberty against the unjust oppression and encroachments of governmental power; and the measure of damages in such cases will be the decrease in the actual value of the property occasioned by the improvement thus made by the public benefit. Unless this construction be

given the constitution, it will fail, in my opinion, to afford that just indemnity for the wrongs of the citizen which was intended to be accomplished by its framers; which was, I repeat, to require the public to bear the burden of municipal improvements of this nature made for the public benefit, and not to crush the private citizen by imposing upon him alone the entire damage which may have been caused to his property. Such an improvement seems to me to be "a construction or enlargement" of a highway, within the meaning of the clause under consideration. And I do not see that any dedication of a street, however long ago it may have been made, could operate to withdraw the case from the operation of the law, in force at the time the improvement is made, which declares, in effect, that the municipality shall indemnify the citizen for any injury or damage to his property resulting from such improvement, equally with any injury or damage done him by the actual taking of such property. It can make no difference in the justice of the case if one's property is reduced to one-half of its original value by an actual taking, or by indirectly covering up his premises with earth piled up at his doorsteps in leveling a street or in digging down his sidewalk so as to render a ladder necessary for access to the place of his abode or his business.

In my opinion, if the uncontroverted evidence in the present case was believed by the jury, the plaintiff was entitled to a recovery. No question seems to be raised as to the amount of the verdict, the rule in *Townsend's Case*, 80 Ala. 489; 2 South. Rep'r, 155, no doubt being followed in the charge of the court, which would put the measure of plaintiff's damages at the difference in the market value of the premises before and after the sidewalk was cut down. *Ry. Co. v. Eberle*, 110 Ind. 542; 11 N. E. Rep'r, 467; *Shars. & B. Lead. Cas. Real Prop.* 470-473.

Under these views, the record shows no ruling of the court prejudicial to the appellant, and the judgment must be affirmed.

McCLELLAN, J. It seems to me there is no escape from the conclusion reached in the opinion of Judge Somerville, that the rule prescribed by the constitution imposes a liability in all cases for damages resulting either from the taking, the injury or the destruction of property in the construction or enlargement of the works, highways or improvements of municipal or other corpora-

tions having the power to take private property for public use. I find no warrant in the constitutional provision, or in any canon of construction as applied thereto, in connection with pre-existing doctrines of the common law, for limiting the right to compensation for such injuries by a consideration of a supposed reservation of power to take, injure or destroy in the original dedication of streets to the public use. I fully concur in the foregoing opinion.

CLOPTON, J. I concur in the affirmance of the judgment on the principles declared in *Townsend's Case*, 80 Ala. 489; 2 South. Rep'r, 155, but not in the modification of the rule laid down in that case.

STONE, C. J. I concur with Judge Clopton.

Change of grade — compensation.— Under constitutions which provide that compensation shall be made, not only for property *taken* for public use, but also for property *damaged* or *injured*, it is universally held that the abutting owner may recover for any damage to his property, by reason of a change in the grade of the street upon which it abuts. *Reardon v. San Francisco*, 66 Cal. 492; *Pekin v. Brereton*, 67 Ill. 477; *Bloomington v. Brokau*, 77 Ill. 194; *Pekin v. Winkel*, 77 Ill. 56; *Elgin v. Eaton*, 83 Ill. 535; *Atlanta v. Green*, 67 Ga. 886; *Moore v. Atlanta*, 70 Ga. 611; *Castleberry v. Atlanta*, 74 Ga. 164; *Johnson v. Parkersburg*, 16 W. Va. 402; *Hutchinson v. Parkersburg*, 25 W. Va. 236; *McElroy v. Kansas City*, 21 Fed. Rep'r, 257; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep'r, 415; *Blanchard v. City of Kansas*, 5 McCrary, 217; *Werth v. Springfield*, 78 Mo. 107; *Householder v. City of Kansas*, 88 Mo. 488. So under the words "injuriously affected" in the English statutes. *Queen v. Vestry of St. Luke's, etc.*, L. R., 6 Q.B. 572; S. C., L. R., 7 Q. B. 148; *Queen v. Wallasey Local Board of Health*, L. R., 4 C. B. 851; *Queen v. Eastern Counties Ry. Co.*, 2 A. & E. (N. S.), 347; S. C., 42 E. C. L. R. 706.

STEINER V. PHILADELPHIA TRACTION COMPANY.

(19 Atl. R. 491; 134 Penn. St. 199.)

1. CABLE-CARS. FRIGHTENING HORSES. LIABILITY. Plaintiff's horses, which were standing in the street, became restive at the approach of a grip-car. Plaintiff went to their heads to quiet them. The car stopped near the horses, and the ringing of the bell frightened them so that they broke away and injured the plaintiff. The car was near a crossing at the time. Held, that a nonsuit was properly directed by the trial court; that it was proper to ring the bell when approaching a crossing, and that no negligence of the company was shown.

Emanuel J. Page, Patrick F. Dever and Theodore F. Jenkins
for appellant. *Thomas Leaming* for appellee.

PER CURIAM. The plaintiff has no cause to complain that he was nonsuited by the court below. He had no case. His claim was a mere attempt to speculate upon the credulity or the prejudices of a jury, and the learned judge below properly held there was nothing to submit to them. The plaintiff was a butcher, residing in Montgomery county, and was in the habit of driving a two-horse wagon to the city of Philadelphia, loaded with meats, which he sold to his customers. On the day of the accident he was engaged on Columbia avenue, delivering meat from his wagon, when his horses became restive at the approach of one of the cars of the defendant company. He then left the rear end of his wagon and went to the horses' heads to quiet them. The car approached, and when near the horses stopped, the gripman at the same time ringing his bell. The horses took fright, broke from plaintiff and ran away, by means of which he was injured, and for which injuries he now claims compensation from defendant company. These are the substantial facts of the case, briefly stated. They disclose no negligence on the part of the company. The car did not touch the plaintiff or his team. The accident was wholly due to the fright of his horses. It was urged, however, that the gripman stopped his car where he should not have done so, and rang his bell needlessly. But he stopped at or near a crossing where he had a right to stop. We do not know why he stopped, nor are we bound to inquire. It may be he saw the horses were restive, and feared coming into collision with them. So far as ringing the bell was concerned, the case closely resembles *Traction Co. v. Bernheimer*, 125 Penn. St. 615; 17 Atl. Rep'r, 477, where we said: "It was not negligence to ring the bell as the car approached Fourth street. It would have been negligence not to have done so." The bell of a traction car is not only rung at all street crossings, but frequently at other places, to warn persons of its approach. Nor does such ringing necessarily tend to frighten horses. If it did, there would be accidents daily. We have said emphatically that it would be negligence not to ring at a crossing, and the plaintiff would probably have been swift to invoke the benefit of such rule had his injury resulted from an omission

to do so. If we now say, or permit a jury to say, that it is negligence to ring at a crossing, what rule would the company or its gripman have to guide them in such cases? Aside from this, if the gripman saw that plaintiff's horses were restive, it does not follow that he had any reason to apprehend the accident that occurred. The plaintiff, according to his own testimony, was at their heads, and might naturally be supposed to be able to control them. There is no analogy between this case and the use of a steam-whistle wantonly blown in a crowded place. The steam-whistle naturally tends to alarm horses; the traction bell does not. What was said of a steam road in *Railroad v. Stinger*, 78 Penn. St. 219, is applicable here: "We have held these corporations to a strict line of responsibility for the failure to give sufficient warning of the approach of their trains at road crossings. It would not be just to them, nor safe to the traveling public, for us now to criticise too closely the precise amount of noise employed in giving the needed warning at such places." We may supplement these remarks by saying that, in view of the crowded condition of the streets of the city of Philadelphia, the number of women and children and of aged and infirm persons who are constantly crossing the tracks of the traction company, not only at street intersections, but elsewhere, we would be loth to sanction a principle which would make a gripman hesitate to ring every time his hand touched the bell rope.

Judgment affirmed.

Frightening horses and cattle. — The following cases relate to the liability of railroad companies for damages resulting from the frightening of horses and cattle by blowing off steam, ringing bells, blowing whistle, etc. *Toledo, etc., R. Co. v. Harman*, 47 Ill. 293; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 451; *Chicago, etc., R. Co. v. Dickson*, 88 Ill. 431; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166; *Culp v. Atchison, etc., R. Co.*, 17 Kans. 475; *Lewis v. Eastern R. Co.*, 60 N. H. 187; *Borst v. Lake Shore, etc., R. Co.*, 66 N. Y. 639; *Lamb v. Old Colony, etc., R. Co.*, 140 Mass. 79; *Hill v. Portland, etc., R. Co.*, 55 Me. 438; *Pennsylvania, etc., R. Co. v. Barnett*, 59 Penn. St. 259; *Philadelphia, etc., R. Co. v. Killips*, 88 Penn. St. 405; *Philadelphia, etc., R. Co. v. Stinger*, 78 Penn. St. 219; *Gibbs v. Chicago, etc., R. Co.*, 26 Minn. 437; *Manchester, etc., R. Co. v. Fullarton*, 14 C. B. (N. S.) 54.

ALLEMANIA FIRE INS. CO. V. PECK ET AL.

(34 N. E. R. 538; — III. —.)

1. **INSURANCE. LIMITATION CLAUSE.** An insurance policy provided that no suit should be brought thereon unless within six months after the fire. Held, that if the company deterred the plaintiffs from bringing suit within the time limited, by engaging in negotiations for a settlement and by holding out reasonable hopes of an adjustment, then the company would be estopped from setting up the limitation. To create such estoppel it is not necessary that the delay should be at the request of the company.

2. **CONDITION AS TO CONTRACT TO SELL.** The policy contained a provision that it should be void if the assured failed to notify the company that a contract had been signed to sell the property insured. Held, that this referred to a contract to sell to a stranger, and not to a contract to sell between the parties insured, the effect of which is merely to change their respective interests.

Myron H. Beach for appellant. *Flower, Smith & Musgrave* for appellees.

BAILEY, J. The record contains evidence tending to support the plaintiffs' replication to the defendant's plea setting up the limitation clause in the policy; but whether said evidence is sufficient to sustain the verdict of the jury upon that issue is purely a question of fact, as to which the judgment of the appellate court is conclusive. We must, therefore, assume that said replication, or at least enough of its averments to constitute a sufficient answer to said plea, was duly proved. We have only to consider whether any error of law was committed in the mode in which that question was submitted to the jury. On this question the court instructed the jury, at the instance of the plaintiffs, that, "even though they should find from the evidence that this action was not brought within the six months' limitation named in the policy, yet, if they still further find from the evidence that, from the date of the fire up to the time the suit was commenced, there were pending negotiations between the plaintiffs and the defendant company, or its agents, in reference to the settlement or adjustment of the loss in question, and that the company or its agents, by holding out reasonable hopes of an adjustment or settlement, deterred the plaintiffs from bringing their suit within the time limited, then in such case the defendant company is estopped from setting up the limitation clause as a defense in this cause."

The defendant asked the court to instruct the jury that, if the suit was not brought within six months after the fire occurred the plaintiffs could not recover, unless they had proved that the commencement of the suit was delayed at the special instance and request of the defendants. This instruction was modified by the court so as to hold that the plaintiffs could not recover unless they had proved that the company or its agents induced the plaintiffs to delay the bringing of a suit within the time limited in the policy for bringing suit, by holding out reasonable hopes of an adjustment or settlement of the plaintiffs' claim. The defendant also asked the court to give to the jury an instruction holding that the offer by the defendant to pay any sum to settle, or with a view of effecting a settlement of, plaintiffs' claim, was not to be taken or considered as an admission by the defendant of any liability to the plaintiffs, and should not be considered as evidence of any obligation on the part of the defendant to pay the plaintiffs' claim, or of indebtedness by the defendant to the plaintiffs. This instruction the court modified by adding thereto as follows: "But it may be considered, in connection with all the other evidence in the case, in determining whether there was any waiver of the limitation clause of the policy by the company." The defendant asked the court to give to the jury another instruction, holding that the offer to pay a sum in settlement of the claim could not be considered by them as a waiver of said condition, nor as an inducement to the plaintiffs to delay the commencement of an action. This instruction was modified so as to hold, merely, that the offer to pay a sum in settlement of the claim, in itself alone, could not be considered by the jury as a waiver of said condition. The defendant also asked the court to give the following instruction: "The court instructs the jury that the burden of showing a waiver of the condition requiring the action to be commenced within six months after the loss occurred is on the plaintiffs, and they must show the same by clear and positive evidence that the defendant requested the plaintiffs to delay the commencement of suit or action. Such request on the part of the defendant cannot be inferred." This instruction was modified and given in the following form: "The court instructs the jury that the burden of showing a waiver of the condition requiring action to be commenced within six months after the fire occurred is on the

plaintiffs, and they must show the same by a preponderance of the evidence, or they cannot recover in this action."

We are of the opinion that the rules of law here involved were correctly given to the jury. The main propositions which the defendant sought, without success, to have embodied in the instructions, were that, to show a waiver by the defendant of the limitation clause in the policy, it was incumbent upon the plaintiffs to prove that their delay in bringing suit was at the special instance and request of the defendant, and also that such proof could only be made by positive evidence, and could not be inferred. That such is not the law is clearly established by the authorities. Thus, in *Insurance Co. v. Whitehill*, 25 Ill. 466, where the question arose in this state for the first time, the rule was laid down as follows: "Where an insurance company shall, by fraud or by holding out reasonable hopes of an adjustment, deter a party assured, being under such a condition to sue, from commencing his suit, he honestly confiding in the pretenses and promises of the assurer, the condition would be no bar." This statement of the law has been cited with approval in various subsequent cases. *Insurance Co. v. Chesnut*, 50 Ill. 111; *Derrick v. Insurance Co.*, 74 Ill. 404; *Insurance Co. v. Myer*, 93 Ill. 271. The same doctrine obtains in other states. In *Martin v. Insurance Co.*, 44 N. J. Law, 485, it is said: "If the delay to bring suit is a result to which the company mainly contributed, by holding out hopes of amicable adjustment, the company cannot be permitted to take advantage of the delay under the limitation clause of the policy." In *Mickey v. Insurance Co.*, 35 Iowa, 174, an instruction was given to the jury holding that, if the plaintiff delayed bringing suit after the expiration of six months, in consequence of inducements held out by the defendant's officer, causing him to believe that the loss would be paid or adjusted without suit, this would operate to remove the bar created by the condition of the policy requiring an action thereon to be brought within six months after the loss. The court, in sustaining this instruction, said: "A course of conduct on the part of defendant, or representations of its officers, which would give reasonable ground upon which plaintiff did in fact base the belief that his claim would be settled, would estop defendant to set up the limitation provided in the policy. It would be contrary to justice for defendant to hold out the hope

of an amicable adjustment of the loss, and thus delay the action of plaintiff, and then be permitted to plead this very delay, which was caused by its own representations, as a defense to the action when brought." See, also, *Insurance Co. v. McGregor*, 63 Tex. 399; *Ripley v. Insurance Co.*, 29 Barb. 552; *Barnum v. Insurance Co.*, 97 N. Y. 188; *McFarland v. Insurance Co.*, 6 W. Va. 425; *Insurance Co. v. Hall*, 12 Mich. 202. It is true the plaintiffs in the present case, in their application, in addition to alleging that the defendant held out reasonable hopes for an adjustment, and thereby deterred the plaintiffs from commencing their suit, and that the plaintiffs honestly confided in the promises and pretenses of the defendant, also allege that they delayed bringing suit at the request of the defendant. This latter allegation, however, was unnecessary, as the other matters alleged in the replication, and which the evidence tended to prove, constituted of themselves a sufficient answer to the plea setting up the limitation clause. It was proper, therefore, to disregard the allegation of a request by the defendant to delay bringing suit as mere surplusage.

We have now to consider whether any error of law was committed by the trial court in respect to the defenses sought to be based upon other conditions of the policy. On this branch of the case, our attention is directed mainly to the clause which provides that the policy shall become void and of no effect "by a failure or neglect of the assured to notify this company that a contract has been signed to sell the property so insured." The facts are that on and prior to September 7, 1883, the plaintiffs were partners under the firm name of Little, Peck & Co., and as such partners were the owners of a leasehold interest in certain lands in Duluth, Minn., and were also owning and operating a steam saw-mill and appurtenances situated on said lands; said saw-mill and appurtenances being the property afterward insured by the policy now in suit. On said 7th day of September, 1883, the plaintiffs, with a view, as the evidence tends to show, of ultimately dissolving their partnership, entered into an agreement among themselves by which Little and Peck agreed to sell their undivided two-thirds interest in the leasehold estate in the lands, and also the saw-mill and appurtenances, to Symonds, for \$16,667, of which Symonds was to pay \$2,500 in three days, \$2,500 in

fifteen days, \$5,000 in forty-five days, and the residue in six months; the conveyance to be made January 1, 1884. Symonds made various payments, aggregating \$7,000, leaving \$9,667 and interest unpaid; and, as he was unable to make further payments, neither party took any further steps to perform the agreement, or to enforce further performance of the other party. The title to the property, so far as it was affected by the agreement, was in this situation on the 21st day of June, 1884, the date of the policy, and so remained at the date of the loss. We are of the opinion that the above-mentioned condition requiring notice to the insurance company of any contract to sell the property insured, must be held to apply only to contracts of sale between the assured and third parties, and that it can have no application to contracts between the assured themselves for the sale or transfer of their respective interests as partners or joint owners. The word "sale," as here used, should doubtless receive the same interpretation which properly belongs to it when used in those conditions which provide that a policy shall become void upon alienation of the property by sale or otherwise. The preponderance of authority in this country is clearly to the effect that such condition is not broken by a sale by one partner to another of his joint interest, at least so long as the party selling retains an insurable interest in the property insured.

In Angell on Insurance, § 197, it is said: "When several owners of property are jointly insured, a sale by one of the owners of his interest in the premises to the other owners is not such an alienation of the property as will avoid the policy, even under an express provision in the act under which the insurance company is incorporated declaring that, when any property insured with such company shall be alienated by sale or otherwise, the policy shall become void. Yet, if the assignor had conveyed his interest to a stranger, the policy would cease to operate as to that share, at least." Also, Mr. May, in discussing the question whether a sale by one joint owner to another is such alienation as will avoid the policy, says: "The better opinion seems to be that it is not, strictly speaking, an alienation — a transfer from one to another — but rather a shifting of interest amongst joint owners, without the introduction of any stranger to the number of the insured. So far as the contract is based upon the personal

qualities of the insured, there is no increase of risk, because no element of improvidence or carelessness is introduced, and the property insured will still be under the care and management of the original parties." May Ins., § 279. It is held in numerous cases that, where an insurance policy is issued to a partnership, a transfer by one partner to the other of all his interest in the partnership property will not vitiate the insurance, notwithstanding a condition that the policy should become void if the property should be sold or conveyed, or the interest of the parties therein changed. *Burnett v. Insurance Co.*, 46 Ala. 11; *Hoffman v. Insurance Co.*, 32 N. Y. 405; *Cowan v. Insurance Co.*, 40 Iowa, 551; *Powers v. Insurance Co.*, 136 Mass. 108; *Pierce v. Insurance Co.*, 50 N. H. 297; *West v. Insurance Co.*, 27 Ohio St. 1; *Lockwood v. Assurance Co.*, 47 Conn. 553; *Dermani v. Insurance Co.*, 26 La. Ann. 69; *Drennen v. Assurance Corp.*, 20 Fed. Rep'r, 657. In some of the cases it is held that where one of several joint owners, in whose name the property is insured, transfers his interest in the property to the other joint owners, so as to retain in himself no insurable interest, no recovery can be had on the policy; but this is not because of the forfeiture imposed by the condition against alienation, but because, at common law, the suit must be brought in the joint names of the insured, and, as the assigning plaintiff would have no insurable interest, no recovery could be had in his name. This seems to have been the real ground upon which the decision of this court was based in *Dix v. Insurance Co.*, 22 Ill. 272, although the court, after sustaining the judgment of the court below on this ground, went further, and held that the assignment by a partner to his copartners of all his interest in the property insured was a breach of the condition of the policy in that case. It should be observed, however, that said condition provided that the policy should be void in case of "any transfer or change of title of the property insured, or of any undivided interest therein," a condition which may well be construed as applying even to a sale by one partner to the other partners of his interest in the partnership property. It is not inconsistent with the rule established in that case, therefore, to hold that a sale by one partner to another of his interest in the property insured in the firm name is not a breach of a condition merely providing generally against alienation by sale, so long, at least, as the

party selling retains an insurable interest in the property insured.

Upon substantially the same ground, it must be held that the contract to sell contemplated by the condition of the policy in this case was a contract between the insured, or some of them, and some third party. The actual interests of partners in the firm property are necessarily fluctuating, and there seems to be no particular reason why the insurers should wish to keep the ownership unchanged, as between them, so long as all retain an insurable interest. The effect of the contract in this case was merely to modify the relative rights of the partners to a certain extent, leaving them all interested in the firm and its property, and admitting no stranger to the possession or control of the property insured. The instructions to the jury upon this branch of the case were in harmony with the views above expressed, and we are of the opinion that they are subject to no just criticism.

It is further objected that there was such change in the possession of the property insured as should be held to be a breach of the condition which provided that the policy should be void and of no effect if there should be any change in the possession of the property insured. The change of possession here referred to, clearly, must be some change during the term of the policy; and it is sufficient to say that there is no evidence tending to show any such change of possession. Little and Symonds were in possession at the date of the policy, and their possession continued without interruption or change down to the time of the fire. There was no condition or stipulation in the policy that Peck, the other member of the firm insured, should be in possession, but merely that the possession should remain during the term of the insurance as it was at its commencement.

Those conditions of the policy relating to misrepresentations or concealments as to the situation or occupancy of the property, or the interest of the insured therein, are in that clause which refers to an application, plan, survey or description, and assumes to make such paper a part of the policy, and a warranty by the insured. The record, however, fails to disclose the existence of any such paper; and so the clause which refers to it attempts to prescribe its place and effect as a part of the contract, and to determine the consequences of misstatements or omissions therein,

must be regarded as inapplicable to the facts in the case, and, therefore, nugatory.

After a patient investigation, we are unable to find any material errors in the record.

The judgment of the appellate court will, therefore, be affirmed.

Limitation in insurance policy — construction and waiver of.— *Murdock v. Franklin Ins. Co.*, 1 Am. R. R. & Corp. Rep. 24; *Barnes v. McMurtry*, ante; note to *German Insurance Co. v. Gray*, post, par. 2.

MOWBRAY V. ANTRIM.

(23 N. E. R. 858; 123 Ind. 24.)

1. BUILDING AND LOAN ASSOCIATIONS. LIABILITY OF SECRETARY FOR FUNDS OF THE ASSOCIATION. The secretary of a building and loan association gave a bond to the association, conditioned that he would well and truly perform the duties of the office as prescribed by the constitution and by-laws of the association. Held, that he was only required to exercise such care as devolves upon an ordinary bailee for hire, and that he was not liable upon his bond for the value of a note lost without any fault or negligence on his part.

Harvey J. Shirk, John Mitchell, Lyman Walker and Wm. E. Mowbray for appellant. *N. N. Antrim, Chas. A. Cole and Wm. B. McClinton* for appellee.

COFFEY, J. This was a suit by the appellee, as receiver of the Working Men's Saving, Loan and Building Association of Peru, Ind., against the appellant, on his bond as secretary of said association. The condition of said bond is as follows: "Now, if the said William E. Mowbray shall well and truly perform the duties of said office of secretary, as prescribed by the constitution and by-laws of said association, then this obligation shall be void; otherwise to be and remain in full force and effect." At the date of the execution of the bond in suit the constitution of the association provided that the secretary should keep correct minutes of the proceedings of the association, and of the board of directors; that he should keep accurate accounts with all stockholders, and attest all orders signed by the president, legally drawn on the

treasurer ; that he should receive all dues for stock and other payments from the members, and pay the same to the treasurer, taking his receipt therefor ; that he should have charge of the seal, and all the books and papers of the association — all of which he should deliver to his successor in office. The complaint alleges that the appellant was duly elected secretary of said association on the 15th day of January, 1880, and duly qualified to serve as such during the year 1880 ; that on the 24th day of January, 1881, he was duly elected as his own successor, and duly qualified ; that during the year 1880 he had in his care, custody and control a certain promissory note belonging to and the property of said association, dated September 25, 1879, due on or before September 25, 1880, payable to the order of the Working Men's Saving, Loan and Building Association of Peru, Ind., for \$200, with interest from date at the rate of eight per cent per annum, without relief from valuation or appraisement laws, with five per cent attorney's fees, signed by Eliza J. Frissal and Noah W. Frissal, and secured by mortgage on the following real estate, in Miami county, Ind., to-wit, lots Nos. 55 and 56, in Smith's second addition to Peru, Ind., * * * which note is of the value of \$315.40 ; that he wrongfully neglected, failed and refused to pay the treasurer of said association the money due on said note, or to deliver to his successor in office said note ; that he failed and refused, and still fails and refuses, to deliver to the plaintiff said note, or the money due thereon, although the plaintiff has specially requested him so to do before the commencement of this suit, whereby the plaintiff has been damaged in the sum of \$315.40. The appellant answered this complaint in nine paragraphs. The court sustained a demurrer to the fourth, fifth, sixth, seventh and ninth paragraphs of the said answer, and this ruling is assigned as error in this court. The fourth paragraph of the answer admits the possession of the note mentioned in the complaint, and the right of the plaintiff to recover nominal damages ; and, in avoidance of all claims for damages, except such as are merely nominal, alleges that in the year 1880, while he held the possession of said note, said association furnished no place for the safe-keeping of its securities ; that appellant occupied a room jointly with one Dukes, who was the president of said association, and was and still is a man of large financial means ; that with the

consent of said Dukes he left said note in the fire-proof safe of the said Dukes, with the other securities of said association; that at the request of the said Dukes, who was the president of said association, and upon his representation that the makers of said note desired to pay the same, at a time when the appellant, by previous arrangement, would be absent from his office, he delivered said note to the said Dukes to receive the money due thereon; that he has never had said note in his possession since he so delivered the same to said Dukes; that the makers of said note now have the possession of the same, but the said Dukes denies that they paid the same to him; that the association brought suit on said note against the makers thereof in the Miami circuit court, after the same was so delivered to the said Dukes, but was defeated in said suit; that no part of said note was ever paid to the appellant. The fifth paragraph of the answer admits that the appellant had the possession of the note mentioned in the complaint as therein alleged, but avers that the same was lost without any fault or negligence on his part; that after the loss of the same, in a suit by the said association against the makers thereof, as upon a lost note, it was defeated; that the makers of said note never paid the same, or any part thereof. The sixth paragraph is the same as the fourth, except that it omits the averments that the appellee delivered the same to Dukes, and the defeat of the association in a suit on the note, and avers that the same was taken from the safe without his knowledge or consent, and avers that the same has never been paid. The seventh avers that the appellant received no money on the note mentioned in the complaint, and that the same was lost while in his possession as secretary of said association, without any fault or negligence on his part. The ninth paragraph is substantially the same as the seventh.

The appellant contends that this case falls within the rule announced in the cases of *Norwood v. Harness*, 98 Ind. 134; *State v. Greensdale*, 106 Ind. 364; 6 N. E. Rep'r, 926; *Slauter v. Favorite*, 107 Ind. 291; 4 N. E. Rep'r, 880; and *Naltner v. Dolan*, 108 Ind. 500; 8 N. E. Rep'r, 289; and that he is liable only for the want of such care as is required of an ordinary trustee or bailee for hire. On the other hand, it is contended by the appellee that the case falls within the rule announced in the cases

of *Halbert v. State*, 22 Ind. 125, and *Inglis v. State*, 61 Ind. 212, and that the appellant is an insurer of the property and money coming into his hands as such secretary. It is said, in some of the cases of the class to which the two last cited belong, that, when a public officer receives funds, the money belongs to him, and that he becomes a debtor to the fund received; and for that reason it is no defense, when called upon to account, to say that the money has been lost, stolen or destroyed. The rule is based upon public policy, and, when applied to public officers, is a salutary one. But the reason for the rule does not exist as to officers of a private corporation. They are in no sense the owners of the money which comes into their hands, and have no right to use it, except in the business of the corporation. If the rule was applicable to private corporations, then the officers of a banking institution would be individually liable to the bank for the funds stolen from the bank, though such theft occurred without their fault or negligence. We are of the opinion that the liability of the appellant is that of an ordinary trustee or bailee for hire, and that it is governed by the rule announced in the cases first above cited. It follows that the circuit court erred in sustaining the demurrers to the fourth, sixth, seventh and ninth paragraphs of the answer. The seventh and ninth paragraphs are general in their terms, but, in the absence of a motion to make them more specific, they are sufficient. *Duffy v. Howard*, 77 Ind. 182; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Jones v. White*, 90 Ind. 255; *Railway Co. v. Walker*, 113 Ind. 196; 15 N. E. Rep'r, 234.

Nor can we say that the evidence which the appellant might have introduced under these paragraphs could be given in evidence under the eighth paragraph of the answer, as contended by the appellee. The proof under the eighth paragraph would be limited to the specific facts therein averred, while under the seventh and ninth it might have taken a much broader range.

It is also complained in this court that the circuit court erred in overruling a demurrer to the third paragraph of the reply to the eighth paragraph of the answer. We think this complaint is well founded. The eighth paragraph of the answer avers that the note mentioned in the complaint was lost while the same was under the control of the appellant, as secretary of said association, without any fault or negligence on his part, under the circum-

stances following: That said association did not designate or provide for appellant, as its secretary, any means for securely keeping the papers left in his possession or custody as such secretary, but appellant, by permission of one Aaron N. Dukes, made use of a suitable safe belonging to said Dukes, and kept in the office jointly occupied by said Dukes and the appellant; that the note in controversy was kept in said safe, to which only said Dukes and the appellant had access; that said Dukes was and is a careful, prudent business man, and then was and still is financially solvent and responsible; that there was a series of notes executed by Frissal and Frissal, as stated in the complaint, three in number, so left in said safe, one of which was the note in controversy; that one of said notes was due and payable about the 15th day of April, 1880, and the others did not mature until after that date; that having received notice from said Frissal that he would about that time pay the note then due, and being at that time necessarily about to be absent from his office and away from said county in which said office was situated, he authorized said Dukes to receive payment of the note then due; that said Dukes did receive said money on the note then due, and paid the same to the appellant, who has fully accounted and paid the same to the treasurer of said association; that thereafter, about the time of the maturity of the note in controversy, the appellant discovered that said note was missing from said safe; that he did not at any time subsequent to said collection, to-wit, on the 15th day of April, 1880, remove said note from said safe, or collect the same or any part thereof, or in any way assent to its collection or removal. To this answer the third paragraph of the reply alleges that the appellant, while acting as secretary of the association, to-wit, on the — day of April, 1880, delivered said note to said Dukes for safe-keeping and for collection, as the agent of the appellant; that while the same was so in the possession of said Dukes, as such agent, to-wit, on the — day of April, 1880, the payee thereof, Noah N. Frissal, paid the same in full to said Dukes, as the agent of the appellant, and that said Dukes thereupon surrendered said note to the said Frissal. This reply proceeds upon the theory that the appellant is liable for the note in controversy, without regard to any question of negligence. A rule that would render him liable, under the circumstances disclosed by this answer and

the reply thereto, would render personally liable the officers of a bank, an administrator and guardians, where they intrust claims for collection to agents or attorneys, however careful they might be in the selection of such agents or attorneys. As we have seen, the rule which holds a public officer as an insurer of the funds in his hands does not apply to officers of a private corporation like the one before us. We think the court erred in overruling the demurrer to this reply.

Judgment reversed, with directions to overrule the demurrer to the fourth, sixth, seventh and ninth paragraphs of the answer, and to sustain the demurrer to the third paragraph of the reply.

Liability on the official bonds of officers and agents of corporations.— It may be laid down as the result of the authorities, that bonds given by the officers and agents of private corporations for the purpose of securing the faithful performance of their duties, will not be construed as enlarging their liability unless the language of the bond clearly requires it. *C., B. & Q. R. Co. v. Bartlett*, 120 Ill. 603; *Baltimore & Ohio R. Co. v. Jackson*, 1 Cent. Law. Rep'r, 926; 83 Alb. L. J. 239; *Walker v. British Guarantee Ass.*, 18 A. & E. (N. S.) 277; *S. C.*, 83 E. C. L.R. 276; *Planters & Merchants' Bank v. Hill*, 1 Stew. 201; *Union Bank v. Clossey*, 10 Johns. 271.

In *C., B. & Q. R. Co. v. Bartlett*, 120 Ill. 603, Bartlett, the defendant, who was paymaster of the company, gave a bond with sureties conditioned that he would "well, truly and faithfully perform the duties required of him by said company as paymaster, and promptly pay over and promptly account for all moneys belonging to said company which shall be received by him as such agent." The sum of \$26,833.54 of the company's money, which had been received by him, was stolen, and the jury found that it was without his fault. The court held that if the money was stolen without Bartlett's fault, neither he nor his bondsmen were liable to the company therefor. After stating the facts the court say:

"The position of appellant's counsel is, that the condition of the bond must be so construed as to give force and effect to all the words contained in it, and that when thus construed, it makes appellees absolute insurers of all moneys which came into Bartlett's hands as paymaster. The general rule requiring effect to be given to all the words of an instrument, to which counsel has adverted is not questioned; but there are well-recognized limitations upon it that are just as well settled as the rule itself, the chief of which is, that an instrument must be so construed as to effectuate the intention of the parties to it, and for this purpose a word will sometimes be construed to mean almost the very opposite of its commonly-accepted signification. Thus, 'and,' the very word to which counsel attach so much significance in this case, is often construed to mean 'or.' So to give effect to the intention of the parties, a word or phrase will be excluded or disregarded altogether, if necessary.

"In determining whether by the use of the words, 'and shall promptly pay over and promptly account for all moneys,' etc., it was intended to impose

upon Bartlett and his sureties a higher degree of responsibility than is indicated by the preceded words, 'shall well and truly and faithfully perform the duties required of him by the company as paymaster,' it is necessary to take into consideration Bartlett's relation to the company, the nature of his existing employment, the duties it imposes, and the degree of responsibility which the law annexed to it. The relation was that of master and servant—principal and agent. The employment was one of confidence and trust, which required of him the handling and paying out for the company from time to time, large sums of money, and of accounting therefor. With respect to the moneys in his hands for such purpose, Bartlett, was a mere bailee for hire, and, consequently, the measure of his legal liability was good faith and ordinary skill, care and diligence in the performance of the duties imposed by his employment. Such being the case, what was the object in taking the bond? Was it to entirely change the character of his responsibility by making him an absolute insurer of all moneys that came into his hands, without regard to his care, diligence or faithfulness to the company? We cannot think such was the object or purpose of the bond. On the contrary we think it was given simply to secure the faithful performance of the duties which the law cast upon Bartlett as paymaster of the company, and nothing more—or, in other words, the object of the bond was to secure the performance of existing duties, and not to create new ones. The condition that he should 'well, truly and faithfully perform the duties required of him as paymaster,' we think covers the whole ground. 'The duties,' in this connection, mean all the duties devolving on him as paymaster, and that which follows, in respect to paying over and accounting for moneys received by him, is nothing more than a mere specification of the principal duties incident to his employment, which were fully covered by the more general provision that preceded it. Clearly, the specifying of these duties did not change Bartlett's liability. When he accepted the office of paymaster, and entered upon his duties, fifteen years before that, although he gave no bond, he nevertheless, by implication of law, promised the company that he would well and truly pay over and account to it for all moneys received by him. This was a continuing promise and obligation on his part, and was not at all changed by the giving of the bond. His duties and obligations remained precisely the same as they were before the bond was given. Until then he alone was bound. Afterward his sureties were equally bound with him. The object of the bond, therefore, as already seen, was to give the company additional security for the performance of Bartlett's duties as they existed before and after its execution. As bearing upon this subject Mr. Peasley's statement, which is a part of appellant's own testimony, is not without significance. He says: 'The bond was exacted by me of Mr. Bartlett, as security for the faithful performance of his duties, and for accounting for such sums of money as he should have in his hands.'"

The case of *Baltimore & Ohio R. Co. v. Jackson*, 1 Cent. Law Rep'r, 926; 33 Alb. L. J. 239, is a very similar case and supports the same doctrine.

In suits upon the official bonds of public officers it has almost uniformly been held that the liability was absolute, and that it was no defense to show that the money was lost by theft or otherwise, without fault of the principal in the bond. *United States v. Prescott*, 3 How. 578; *United States v. Morgan*,

11 How. 154; *United States v. Dashiell*, 4 Wall. 182; *United States v. Kebler*, 9 Wall. 83; *Boyden v. United States*, 13 Wall. 17; *Beavans v. United States*, 13 Wall. 56; *United States v. Thomas*, 15 Wall. 337; *State v. Harper*, 6 Ohio, 607; *Halbert v. State*, 22 Ind. 125; *Merbeck v. State*, 28 Ind. 86; *Inglis v. State*, 61 Ind. 212; *Inhabitants of New Providence v. McEachren*, 33 N. J. L. 839; S. C., 35 N. J. L. 528; *State v. Morse*, 74 Mo. 413; *District Township v. Morton*, 37 Iowa, 550; *Ross v. Hatch*, 5 Iowa, 149; *District Township v. Smith*, 38 Iowa, 9; *Muzzey v. Shattuck*, 1 Denio, 233; S. C., 7 Hill, 584; *Commonwealth v. Conley*, 3 Penn. St. 372; *County Comrs. v. Jones*, 18 Minn. 199; *County of Redwood v. Tower*, 23 Minn. 45; *Thompson v. Trustees*, 30 Ill. 99; *Clay County v. Simonson*, 1 Dak. 403; *Jefferson Co. v. Linberger*, 3 Mon. 281; *Boggs v. State*, 46 Tex. 10.

MAYOR, ETC., OF BALTIMORE ET AL. V. KEYSER ET AL.

(19 Atl. R. 706; — Md. —.)

1. MUNICIPAL CORPORATIONS. RIGHT OF TAX PAYERS TO ENJOIN ILLEGAL CONTRACT. An injunction will be granted at the suit of a tax payer to restrain the officers of a municipal corporation from making a contract which they have no authority to make and which will increase the burden of taxation.

2. AWARDED CONTRACT TO LOWEST BIDDER. An ordinance of the city of Baltimore authorized the mayor, comptroller and superintendent of lamps to advertise for proposals for electric lighting, to receive bids up to twelve o'clock of a certain day and award the contract therefor to the lowest responsible bidder. Advertisements were made, and on the day specified the mayor and comptroller, at six minutes past twelve, in the absence of the superintendent of streets, and without ascertaining whether any bids had been filed with him, proceeded to open the one bid which had been filed with the mayor, and to award the contract to the bidder therein, the Brush Electric Company. At ten minutes past twelve the superintendent of streets appeared and presented a sealed bid which had been filed within the time, but which they refused to open or consider. Held, that the officers had not proceeded in good faith according to the authority conferred upon them and the contract with the Brush Company would be enjoined.

3. NO OTHER DAMAGE NEED BE SHOWN THAN INVALIDITY OF CONTRACT. It was not essential to the relief that it should appear what the unopened bid was or that it was lower than the bid of the Brush Company. There was a want of power to make a contract except in the mode and manner prescribed by law, and the complainants have a right to require that the money they have contributed for the public benefit shall be spent only for the purposes, and in the manner, authorized by law.

Barnard Carter, R. Stockett Mathews and R. W. Baldwin for appellants. *Robert D. Morrison, Nicholas P. Bond and Howard Munnikhuyzen* for appellees.

ROBINSON, J. This is a bill to restrain the defendant officials from entering into a contract for lighting certain streets and public buildings in Baltimore city with electric light, and to restrain the city authorities from paying any money under said contract. It is filed by tax payers of the city in their own behalf, and in behalf of all other tax payers who may see fit to come in as parties. The injunction is asked on the ground that the defendants have no lawful power to make the contract in question, and that the contract, if made, will impose upon the complainants an increased burden of taxation. Now, if this be so — if the contract is one which the defendants have no authority to make, and the contract, if made, will increase the burden of taxation — then the injunction was properly granted. Since the decision in Gill's Case, 31 Md. 395, this can no longer be considered an open question. While fully recognizing the general principle that public wrongs are not to be redressed at the suit of individuals who have no other interest in the matter than the rest of the public, the court in that case held that where the city authorities undertake to make a contract without the lawful power to make it, and the contract, if made, will increase the burden of taxation, tax payers constitute a special class, having a special interest in the subject-matter distinct from that of the general public. In all such cases an injunction is, upon obvious principles, the most convenient and appropriate remedy. And in the still later case of Industrial School v. Brown, 45 Md. 310, an injunction was held to be the proper remedy whenever it appears that municipal corporations and their officers are "acting *ultra vires*, or are assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such unauthorized acts may affect injuriously the rights and property of the parties complaining." The authority of these cases is in no manner weakened, nor is the principle upon which they were decided in any manner questioned, in the subsequent cases of Mayor, etc., v. Weatherby, 52 Md. 442, and Kelly v. Mayor, etc., 53 Md. 134. There was no ordinance in Weatherby's Case, say the court, "requiring the board of school commissioners to advertise for sealed proposals for furnishing supplies or heating apparatus for school-houses." The subject-matter was one entirely within the power and control of the mayor and city council, and

there was no ground, therefore, for the interference of a court of equity. And in *Kelly v. Mayor, etc.*, the whole controversy, in the opinion of the court, was one "between rival tradesmen for the custom of the mayor and city council in supplying the departments with stationery and printed matter, with regard to which the public had no concern.

The real question, then, in this case, is whether the defendants had the power to award the contract for lighting certain streets and public buildings to the Brush Electric Company, this being the contract out of which this controversy has arisen. And this depends upon the construction of the ordinance of the mayor and city council passed May 29, under which the authority of the defendants to make the contract is derived, and by which the terms and conditions on which the authority is to be exercised are plainly prescribed. By section 1 of this ordinance, the defendants were authorized to contract with the lowest responsible bidder for lighting certain streets and public buildings with electric light. Section 2 provides they shall advertise in the daily newspaper for proposals, and that the proposals filed shall be opened, and the contract shall be awarded to the lowest responsible bidder, at twelve o'clock, June 1. Section 3 requires that each proposal shall be accompanied by a cash deposit or certified check of \$5,000. This is the ordinance under which the authority of the mayor and the comptroller and the superintendent of lamps to make the contract in question is derived, and these are the terms and conditions by which the exercise of this authority is to be governed. Now, it can hardly be necessary to say that, where a special power is thus conferred upon officers of a municipal corporation to make a contract, and the terms and conditions upon which the authority is to be exercised are prescribed, there must be at least a substantial compliance with such terms and conditions, or the contract will be invalid. Now, in authorizing the defendants to make a contract for lighting certain streets and public buildings, the ordinance required, in the first place, that they should advertise for proposals; and then it required that they should open the proposals filed under the advertisement; and then it required that they should award the contract to the lowest responsible bidder. The object — the plain object — of these provisions was to prevent favoritism in awarding the contract, and to secure to the

people of Baltimore city the advantages and benefits to be derived from competitive bidding. The terms and conditions thus prescribed by the ordinance are conditions precedent, the compliance with which by the defendants was absolutely essential to the exercise of the power conferred. So the question, after all, comes to this: Was the contract in question made in the mode and manner, and upon the conditions prescribed by the ordinance? And, as this is an application for preliminary injunction, the question is one to be determined upon the bill and answer. What, then, are the averments in the bill on which the equity of the complainants rests? After setting out the ordinance, they allege that advertisements for proposals, signed by the superintendent of lamps, were published in three daily newspapers—the said proposals to be filed at his office up to twelve o'clock noon, June 1; and they further allege and charge that they are informed and believe, and so aver, that a certain sealed proposal or proposals were filed at the office of the superintendent of lamps before twelve o'clock noon, June 1, accompanied by a duly-certified check for \$5,000, and that the said superintendent appeared at the mayor's office at six minutes past twelve o'clock, June 1, and presented said proposal or proposals to the mayor and comptroller, and that they refused to open and consider the same. That the mayor and comptroller, at twelve o'clock, June 1, without waiting for the superintendent of lamps, or the production of any proposals filed with him, or making any inquiry as to whether any proposals had in fact been filed at his office, proceeded to open a proposal filed by the Brush Electric Company with the mayor, and not filed with the superintendent of lamps, as required by the advertisement, and to award the contract for electric lighting to said company.

For reasons which do not appear, the mayor and comptroller and superintendent of lamps have not deemed it necessary to answer the bill; and the only answer filed is one filed by the Brush Electric Company. After denying the power of the defendant officials to designate the office of the superintendent of lamps as the only place to file proposals under the ordinance, this company says it filed with the mayor sealed proposals for electric lighting, in conformity with the requirements of the ordinance, and that some time before the hour of twelve o'clock noon, June

1, the mayor sent for the comptroller, and for the superintendent of lamps; that the comptroller thereupon appeared, and that at six minutes past twelve o'clock the mayor took from his desk the proposals filed by the defendant company, saying "the time had arrived for the consideration of bids for electric lighting;" and, after referring to the absence of the superintendent of lamps, and making some inquiries whether any other bids had been filed, he opened said proposal, and, having read it, handed it to the comptroller; and, "without haste or hurry of any kind," the mayor said, "As there appears to be but one bid, there is nothing for us to do but to award the contract to the Brush Company;" and thereupon, at the suggestion of one of the representatives of the company standing by, the mayor, with the assent of the comptroller, announced that the contract was awarded to the Brush Company. Just at this time, Mr. King, the superintendent of lamps, entered the room, with an envelope in his hand, which was indorsed, "proposals for electric lighting," and addressed to the mayor, comptroller and superintendent of lamps. It was then ten minutes past twelve o'clock.

It thus appears that bidders were notified by public advertisement to file their proposals with the superintendent of lamps by twelve o'clock noon, June 1; and that at six minutes past the hour thus designated the mayor and comptroller, in the absence of the superintendent, opened the proposal filed by the Brush Company with the mayor, it being the only proposal before them, and undertook to award the contract for electric lighting; and when the superintendent entered the room, at ten minutes past twelve o'clock, with a proposal filed at his office within the time required by the ordinance, they refused to open and consider said proposal. And this, too, under an ordinance which had carefully provided that the mayor and the comptroller and the superintendent should open all proposals filed within the time designated, and should award the contract to the lowest responsible bidder. These conditions were, as we have said, conditions precedent, compliance with which was absolutely necessary to the exercise of the power to make the contract. They had no power to make a contract without advertising for proposals, nor had they any power to make a contract without opening all proposals filed within the time designated, nor had they any power to award the contract

to any one other than the lowest responsible bidder. Now, it can hardly be said that these conditions have been fairly complied with in awarding this contract. The fact that bidders had been notified by public advertisement to file their proposals with the superintendent of lamps up to the hour of twelve o'clock noon was known to the mayor and comptroller; and this notice, we must presume, was published with their consent, and by their authority. And, if so, they know it must take some time — how many minutes or seconds we are unable to say — for that officer to go from his office to the office of the mayor; and, if he was not there precisely at twelve o'clock, or six minutes past twelve, it was their duty to have sent some one to inquire as to the cause of his detention, or to have waited at least a reasonable time, and above all, to have ascertained whether any proposals had been filed with him under the advertisement. We cannot agree to any such narrow and strained construction of the ordinance as this, nor can we permit the spirit and meaning of its provisions, intended to guard and protect the public interests, to be defeated by such indiscreet haste on the part of officials charged with the duty of making a contract of so much importance, and involving the expenditure of so much money.

But then, it was argued, there is no ground for the interference of a court of equity, because the bill nowhere alleges that the proposal which the defendants refused to open and consider was a lower bid than the one filed by the Brush Company, and it does not, therefore, appear that the complainants suffered any damage by the refusal to consider this bid. This assumes that the defendants had the power to make a contract for electric lighting, without reference to the terms and conditions of the ordinance under which the power is exercised, and that, upon a bill filed to restrain the execution of such a contract, the complainants must allege and prove that a contract on better and more favorable terms might have been made if the requirements of the ordinance had been complied with. We cannot agree to this. They had no power to make a contract except in the mode and manner prescribed by law; and we agree with the court below that the complainants have a right to require that the money they have contributed for the public benefit shall be spent only for the purposes, and in the manner, authorized by law, and that every

security designed to protect its proper expenditure shall be faithfully observed. This right is a vital one to them, and they are required to allege no other injury than that it is about to be violated. They will be injured if the violation is permitted by the act of violation alone. If all the proposals filed in conformity with the requirements of the ordinance had been opened and considered, and the defendants had then awarded the contract, in such a case we agree that, to entitle the complainants to the interference of a court of equity, it would be necessary to allege that they had not awarded the contract to the lowest responsible bidder.

Other objections were relied on in argument, in regard to which we have but a word to say. It was argued that the proposal which the defendants refused to open ought to have been filed as an exhibit with the bill. Now, it is true, where the right to an injunction is based upon a written instrument in the possession of the complainant, or to which he has ready access, the instrument itself, or a copy, ought to be filed with the bill, in order that the court may see whether the complainant is entitled to the relief prayed. But here the right of the complainants to an injunction is not founded on the written contents of the proposal filed with the superintendent of lamps, but upon the averment that a proposal was filed with him in conformity with the requirements of the ordinance, and that this proposal the defendants refuse to open and consider. This averment is not denied in the answer, and must, therefore, be taken as true. And, besides, this proposal was one not made by the complainants, but by a stranger; and they had no right to demand either the proposal itself, or a copy. We shall not stop to consider whether this bill is filed in good faith, nor whether the rejected proposal was filed by a company authorized by its charter to do electric lighting. These are matters in no manner responsive to the bill, and must be established by proof at the final hearing, and cannot be relied on by the defendants to defeat the preliminary injunction.

Order affirmed, and cause remanded.

See *City of Detroit v. Hosmer*, 1 Am. R. R. & Corp. Rep. 481.

GERMAN INSURANCE Co. v. GRAY.

(23 Pac. R. 637; 43 Kans. 497.)

1. **INSURANCE. APPLICATION MADE BY AGENT OF COMPANY HELD NOT BINDING ON INSURED.** In an application for insurance, where correct answers are given to a general agent of the company respecting incumbrances on the property of the applicant, and such agent fails to mention the incumbrances in the written application, but procures the signature of the applicant, accepts the premium, and closes the contract, the company will not be relieved from liability on account of misrepresentations in the application, although it was stipulated therein that it should be considered a part of the policy and a warranty by the insured of the truth of the statements which it contained.

2. **WAIVER BY AGENT.** A general agent of an insurance company can modify the insurance contract, or waive a condition of a written policy by parol.

3. A provision in an insurance policy respecting incumbrances on the property insured may be waived by the insurance company or its general agent; and this, although the policy contains a printed stipulation that no agent of the company or any person other than the president or secretary shall have authority to waive any of the terms or conditions of the policy, and all agreements by the president or secretary must be signed by either of them.

4. **PROOFS OF LOSS. ESTOPPEL TO OBJECT THERETO.** Where proofs of loss are taken by a duly-authorized adjuster of the company, who expresses satisfaction with the same, and states that he will forward them to the office of the company, and that the loss will soon be paid, the insured has a right to assume, until notified to the contrary, that no other or different proofs will be required; and the failure of the company to object to them within a reasonable time precludes it from thereafter objecting that they are insufficient.

THIS was an action for loss by fire upon a policy of insurance executed December 4, 1885, insuring, among other property, the following, for the amounts named: Barn and shed, \$200; hay in barn, \$200; grain in barn and in stack on cultivated premises, \$1,500; farming implements, \$300. The fire occurred on May 28, 1886, and the property mentioned, which is alleged to be of the total value of \$2,200, was wholly destroyed by the fire. The plaintiff alleged that the contract of insurance was in full force at the time of the fire, and that the property was destroyed without any fault of his, and that he had fully complied with all the requirements and agreements of the contract, but the insurance company refused, and still refuses, to pay the amount of the loss. He demanded judgment in the sum of \$2,200, with interest from the time of the fire. The answer alleged that in the application for insurance by Gray he warranted that all the answers

made by him to questions therein propounded were true; that, in response to a question in regard to what mortgages and incumbrances were upon the property, he failed to disclose a mortgage for \$5,749.35, dated March 23, 1885, in favor of John S. Woods; and, further, that Gray, after the issuance of the policy, and without the consent of the insurance company indorsed on the policy, and in violation of the terms of the policy, incumbered and mortgaged the property insured under the policy as follows: On May 15, 1886, he made and delivered a mortgage to A. Brenna-man for \$3,110, upon the real estate on which the insured build-ings stood, and upon two thousand bushels of wheat in the gran-ary, and about three hundred acres of growing wheat; and, further, on December 22, 1885, that he made and delivered to Sumner County Bank a mortgage of \$700 on some farming implements and other articles covered by the policy. In his reply Gray ad-mitted the existence and the making of the mortgages mentioned in the answer, but alleged that he gave a full statement of all the incumbrances on the property when the application for insurance was made, and also made known to the defendant that the mort-gages would mature during the existence of the policy, and that he would be wholly unable to meet the indebtedness or remove the incumbrances, except by making and giving new mortgages, and renewing the incumbrances on the property; and he alleges that it was expressly stipulated and agreed between himself and the insurance company that he should be permitted to incumber his property, and that H. Steinbuschel & Bro., the duly-author-ized agents of the company, expressly waived the condition writ-ten in the policy against incumbrances, and expressly agreed in behalf of the company that he should have the right, notwith-standing the printed stipulations, to renew and extend the mort-gages and incumbrances upon the property, or any part thereof.

Upon the trial the jury returned special findings of fact with their general verdict, as follows: "Question. Were there any chattel mortgages on the wheat covered by the insurance policy sued on in this action at the time said insurance policy was issued and delivered to Anderson Gray? A. Yes. (5) Q. Did the said plaintiff at any time after the insurance and delivery to the said Anderson Gray of the insurance policy sued on this action, and before the time plaintiff claims that the property covered by

said policy was destroyed by fire, give to any person any chattel mortgage upon any of the property covered by said policy? A. Yes." (7) Q. Were there any chattel mortgages upon any of the property covered by the insurance policy sued on in this action at the time said plaintiff claims the said property was destroyed by fire? A. Yes." (10) Q. What was the value of each item of property insured at the time plaintiff claims the same was destroyed by fire? A. Two thousand bushels wheat, \$1,500; six tons hay, \$18; two two-horse Bain wagons, \$80; one piano-box, single buggy, \$100; one ten-foot Hodge header, \$100; one Buck-eye mower, \$40; one Bradley hay-rake, \$15; one corn-planter, \$45; one Wier double cultivator, \$15; one press wheat-drill, \$40; two one-horse wheat drills, \$30; one wheat fanning-mill, \$30; barn, \$800; harness, \$55. (11) Q. What interest did the plaintiff have in and to each separate item of said property at the time he claims said property was destroyed? A. Wheat, owner; hay, owner; Bain two-horse wagons, owner; one piano-box single buggy, owner; header, owner; one mower, owner; one hay-rake, owner; corn-planter, owner; double cultivator, owner; press wheat-drill, owner; two one-horse wheat-drills, owner; fanning-mill, owner; barn, owner; harness, owner. (12) Q. What was the value of the plaintiff's interest in each item of said property at the time said plaintiff claims the same was destroyed by fire? A. Same as No. 10. (13) Q. Did the plaintiff read the written application for insurance which has been offered in evidence in the case before or at the time he signed the same? A. No. (14) Q. Could plaintiff at that time read writing and printing well enough to read such written application? A. Yes. (15) Q. Did plaintiff have an opportunity to read said written application before or at the time he signed the same? A. Yes. (16) Q. Did Anderson Gray, the plaintiff in this action, tell Mr. Steinbuschel, the agent of said defendant at the time said written application for insurance was being written up, or before that time, of the existence of any mortgages upon any of the property covered by said insurance policy other than the one mentioned in said written application? A. Yes." (18) Q. If you answer question 16 in the affirmative, then you may state if said agent of the defendant stated to plaintiff at that time that he would not mention such mortgages in said written application. A. Yes." (20) Q. If all the mortgages

that were upon the said property, or any part thereof, so covered by said insurance policy, were not mentioned in said written application, state fully why they were not so mentioned, and all the reasons therefor, so far as you find that they were known to plaintiff at that time. A. Agent refused to put it in application, saying it was not necessary, because 'I issue my own policies and adjust the losses.' (21) Q. Was the plaintiff at any time authorized by said defendant to mortgage or re-mortgage the said property covered by said insurance policy after the said insurance was issued and delivered to said plaintiff? A. Yes. (22) Q. If you answer question No. 21 in the affirmative, you will then please state at what time said authority was given, and by what officer or agent such authority was given, and whether such authority was given orally or in writing. A. First, when application was made out; second, when policy was returned by Steinbuschel & Bro., district agent." Orally. "We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and assess the amount of his recovery at \$2,018, with interest at seven per cent from July 28, 1886."

A motion for a new trial was made and overruled, and the court thereupon entered judgment in accordance with the verdict for \$2,125.95, with interest thereon from June 4, 1887, at the rate of seven per cent per annum. The insurance company brings the case here, alleging error, and asking a reversal of the judgment.

G. W. Barnett, George & King and *W. F. Rightmire* for plaintiff in error. *McDonald & Parker* for defendant in error.

JOHNSTON, J. (after stating the facts as above). The greater part of the testimony taken in the case was with reference to the extent and value of the property destroyed, and as to whether or not the fire was the result of the action of the insured. But these questions, as well as all others upon which there was a conflict of evidence, have been determined by the jury in favor of the insured. The insurance company now seeks to escape liability upon the ground that Gray failed to disclose the existence of incumbrances upon the property when he made the application for insurance, and also because he had incumbered the property after the policy was issued without the consent of the company indorsed thereon,

and in violation of its provisions. The application for insurance was made on December 2, 1885, to Steinbuschel & Bro., of Wichita, who were agents of the company for that portion of the state in which the property was situated. They wrote the answers to the questions propounded to Gray, and the application contained the statement that the answers made were true. The application only mentions one mortgage, but Gray testifies that he stated his indebtedness and the incumbrances on his property to the agents fully and in detail, telling them that it would be necessary for him to mortgage and re-mortgage his property in the conduct of his business during the time for which the insurance was contracted. This is disputed; but the jury sustain Gray, and find that the company was fully informed in respect to the existing incumbrances. The policy was not delivered by the agents at the time the application was made, but was sent by them to Gray at Conway Springs, Sumner county, near which place he resided. Soon after it had been so delivered, he discovered that it contained a provision that if the property should thereafter become mortgaged or incumbered, or in case a change should take place in the title, the policy should be null and void. He immediately went to the agent, called his attention to the provision prohibiting the incumbering of his property, and insisted that it must be changed. After looking at the policy, Steinbuschel said that he would waive the condition relative to incumbrances, stating that he had authority for that purpose, and Gray, acting upon this waiver and agreement, mortgaged the property, as has already been stated. The incumbrances placed on the property, however, were mostly, if not entirely, the renewal and extension of debts and mortgages existing when the contract of insurance was made. In regard to the misrepresentations in the application, we must assume that Gray gave correct answers to all questions asked. There was no concealment nor deception on his part. Steinbuschel, authorized by and acting for the company, prepared the application, and purposely omitted a fuller statement concerning incumbrances. It was the fault of Steinbuschel or the company which he represented, and not of the insured, that the application did not contain a complete statement. Steinbuschel having authority, his act must be treated as the act of the company, and through him the company had knowledge of all the incumbrances. With this

knowledge, the company accepted the risk, and the premium therefor, induced Gray to sign the application, which did not state the whole truth, and now, when the loss occurs, they cannot, under our decisions, insist on the breach of warranty or the untruth of the representations. *Sullivan v. Insurance Co.*, 34 Kans. 170; 8 Pac. Rep'r, 112; *Insurance Co. v. Pearce*, 39 Kans. 396; 18 Pac. Rep'r, 291; *Insurance Co. v. Barnes*, 41 Kans. 161; 21 Pac. Rep'r, 165; *Protective Union v. Gardner*, 41 Kans. 401; 21 Pac. Rep'r, 233.

It is next contended that the giving of the subsequent mortgages by the insured avoided the policy; and in that connection it is urged that error was committed in admitting testimony of the verbal agreement modifying the terms of the policy, and waiving its conditions. We think the waiver must be upheld, and the point made by the company overruled. The agents who made the agreement were more than mere local or soliciting agents. They fully represented the company within a certain district; were authorized to solicit insurance, receive moneys and premiums, issue and renew policies; and the testimony is that they appointed sub-agents and adjusted losses. Only a short time previous to the making of the contract in question, they adjusted a loss under another insurance policy issued by the same company to Gray and paid him the amount of the loss. Gray had a right to assume and we may fairly assume, that they were general agents of the company. In this state the courts have taken a liberal view with reference to the power of agents, and especially where they were representing foreign companies, which can only act through their agents, and where the agent is practically the principal in the making of contracts. *Insurance Co. v. McLanathan*, 11 Kans. 549, and cases above cited. Being general agents, empowered to make and renew contracts, they stood in this respect in the place of the company, and certainly must be held to have the power to modify the same, or to waive any of the conditions in the contract which they had made. We are referred to *Insurance Co. v. Gibbons*, 22 Pac. Rep'r, 1010, where the power of the agent to waive a condition was denied. In that case the agent had no authority from his company except as a soliciting agent, and it did not appear that he had any authority to issue policies, and he did not even countersign them when issued." In that case, however, it was

said that "it has generally been held that where a person in procuring an insurance upon his property acts in good faith, and without any knowledge of any limitations upon the authority of the agent of the insurance company effecting the insurance, such person may assume that the agent is a general agent of the insurance company for that purpose; that he stands in the place of the company, and that the company will be bound by any terms or conditions or any waiver of terms or conditions which the agent may agree to while acting for the company in consummating the insurance." If it was within the power of the company, acting through its agents to waive a condition or change the contract, it surely might do so by a parol contract, and might even waive the provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions. In *Insurance Co. v. Earle*, 33 Mich. 143, the court, in considering the question whether an agent of a company might change the conditions of a policy by parol, wherein it was provided that it could only be done upon the consent of the company written thereon, held that the written policy might be changed by parol, and stated that "a written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." See, also, *Insurance Co. v. Fahrenkrug*, 68 Ill. 463. In the present case, as in some of the cases cited, it was stipulated in the policy that no agent of the company, or any other person than the president or secretary, should have authority to alter or waive any of the terms or conditions of the policy, or make any indorsement thereon, and all agreements of the president or secretary must be signed by either of them. This provision, however, may be modified by the company to the same extent as any other, and whatever the company can do may be done by its general agents.

Reiner v. Insurance Co., 42 N. W. Rep'r, 208, was a case somewhat similar to the one we are considering. In that case the policy provided that the application should form a part of the policy and a warranty by the assured. In the application for insurance it was stated that the property insured was not incumbered, but it appeared that the property was mortgaged, and that the insured

informed the agent of the company of the existence of the mortgages, and he falsely wrote the answers therein, and the application was signed at the request of the agent. In the policy issued was a provision that "no act or omission of the company, or any act of its officers or agents, shall be deemed, construed or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, except it be a waiver or extension in express terms and in writing, signed by the president or secretary of the company." It was held that the action of the agent, with knowledge of the existence of the mortgages, was binding upon the company, and a waiver of the condition of the policy against incumbrances; and this, notwithstanding the limitation of authority of such agent expressed in the provision quoted on the face of the policy. Speaking of the restriction, the court said: "We must hold, however, that such attempted restrictions upon the power of the company or its general officers or agents, acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy are ineffectual. Especially is this true in respect to a foreign insurance company whose officers are practically inaccessible to the assured." Citing *Gans v. Insurance Co.*, 43 Wis. 108; *Insurance Co. v. Gallatin*, 48 Wis. 36; 3 N. W. Rep'r, 772; *Shafer v. Insurance Co.*, 53 Wis. 361; 10 N. W. Rep'r, 381; *Lamberton v. Insurance Co.*, 39 N. W. Rep'r, 76; *Willcuts v. Insurance Co.*, 81 Ind. 308; *Steen v. Insurance Co.*, 89 N. Y. 326; *Richmond v. Insurance Co.*, 79 N. Y. 230; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *Insurance Co. v. Green*, 57 Ga. 469; *Insurance Co. v. Earle*, 33 Mich. 143.

The court, proceeding further, says: "Of course, an insurance company, and especially a foreign insurance company, in making contracts of insurance, and adjusting, settling and paying losses, must act through its agents, if at all. To hold that, in such negotiations between such general agents and the assured, the latter is bound, but that in the same transaction the company, the agent's principal, cannot be bound by reason of having incapacitated itself and them, by previous stipulations, from agreeing to any thing contrary to the conditions contained in the original contract, is, under most policies, in effect to hold that there is no mutuality in

such contracts, and that the powers of such general agents are limited to the obtaining of premiums, and then defeating the enforcement of the policies upon which they were paid." It is clear that the company was not so bound but that it might modify any contract which it had made, or waive any of the conditions contained therein; and this may be done through its general agents. The knowledge of Steinbuschel & Bro. in this case was the knowledge of the company, and their act was its act. When Gray applied for the insurance he informed the company with reference to the incumbrances, as well as his necessity and purpose to continue them. 'Knowing these facts, the premium was accepted, and the policy issued. Subsequent to the issuance of the policy, there was an express agreement that he might renew his mortgages as he had informed the company it would be necessary to do, and the renewal of the incumbrances did not in any material degree affect the risk which the company took. Accepting his statement, as the jury have done, we must assume that he acted in good faith with the company and its agents, and that he was induced by the agreements and action of the company to believe that he was warranted in renewing the mortgages. After receiving and retaining the premium, knowing the purpose and necessity of Gray to renew the incumbrances, and after a specific agreement waiving that condition of the policy and authorizing him to renew the incumbrances and after remaining silent and allowing him to proceed as though he was insured, until a loss occurs, the company will not be heard to repudiate its contract or to deny its liability. We are aware that the authorities are not uniform upon the subject of waivers in policies like this one, but forfeitures are not favored in the law and the view we have taken of the power of a general agent to waive the condition of a policy is more satisfactory to us and is sufficiently supported. In addition to the authorities already cited, see the following: *Young v. Insurance Co.*, 45 Iowa, 377; *King v. Insurance Co.*, 72 Iowa, 310; 33 N. W. Rep'r, 690; *Morrison v. Insurance Co.*, 6 S. W. Rep'r, 605; *McGurk v. Insurance Co.*, 16 Atl. Rep'r, 263; *Insurance Co. v. Gallatin*, 48 Wis. 36; 3 N. W. Rep'r, 772; *Bartlett v. Insurance Co.*, 41 N. W. Rep'r, 601; *Key v. Insurance Co.*, 41 N. W. Rep'r, 614; *Aid Ass'n v. Sweetser*, 19 N. E. Rep'r, 722; 2 Wood Ins., §§ 422, 525.

It is further contended that a forfeiture occurred by reason of the failure of Gray to send proofs of loss to the company. It is shown that immediately after the fire he notified Steinbuschel & Bro. of the loss, and they stated that they would at once inform the company. Within a few days an adjuster of the company, whose authority is not denied, came to Gray's place, and requested him to go before an officer and make proof of loss. The proofs were reduced to writing, signed and sworn to, and delivered to the adjuster; and there is testimony to the effect that he expressed satisfaction with them, and stated that he would forward them to the company's office, and would return in a few days, and settle the loss. This testimony was submitted to the jury under the following directions: "There is evidence tending to show that these statements were taken by said Winne as the agent of said company, and sent to said company, and it will be a question for the jury to determine whether such statements and proofs are such as are required by the policy; and, if not, whether the plaintiff was justified under the circumstances in believing, and did believe, that the proofs were satisfactory to the agent of the company and to the company, and that no further proofs would be required; and if the jury find from the evidence that the plaintiff was justified in believing, and did believe, that the proofs furnished to said Winne were satisfactory to him and to the company; and further find that such proofs and statements were sent to the company by said Winne, and that the company made no objection thereto, and requested no further proofs to be made by the plaintiff within a reasonable time and within the sixty days after the fire — the jury would be justified in finding that defendant had waived the making of further proofs of loss. If, at the time such affidavits and statements were made at the request of said Winne, it was understood between said agent and said plaintiff that such statements and affidavits should not constitute the proofs required by the policy, and should not be considered as a waiver of such proofs, and that by taking such statements and affidavits said Winne should not and did not waive the making of the proofs in accordance with the provisions of the policy, then the jury would not be justified in finding that the taking of such statements and affidavits by said Winne, or that the acts and conduct of said Winne at the time of taking such statements and

affidavits, constituted a waiver of the proofs required by the policy." The testimony was sufficient to sustain the finding of the jury. Neither the adjuster nor any one representing the company returned the proofs, or claimed that they were insufficient. The company recognized the loss, took all the proofs it deemed essential to an adjustment, and, instead of claiming that they were insufficient, expressed satisfaction with them, and stated that the loss would soon be paid. Assuming the existence of the facts stated, we think the assured had a right to assume, until notified to the contrary, that no other or different proofs would be required. There are some criticisms in regard to the refusal of the court to give instructions, but what has already been said in the opinion disposes of the material objections that are made. The charge of the court fairly submitted the questions involved to the jury. Finding no error, the judgment of the district court will be affirmed.

All the justices concurring.

INSURANCE LAW. RECENT DECISIONS.

1. *Agents, their powers and duties — waiver by.*— The agent of an insurance company, who is authorized to procure applications for insurance and to forward them to the company for acceptance, is the agent of the insurer, and not of the insured, in all that he does in preparing the applications, or as to any representations as to the character and effect of the statements so made. *State Ins. Co. v. Jordan* (Neb.), 45 N. W. Rep'r. 792; *Detroit v. Mutual Fire Ins. Co.* (Mich.), 45 N. W. Rep'r, 356; *Kansal v. Insurance Co.*, 31 Minn. 21. This rule applies as well to mutual companies as to stock companies, as the insured does not become a member of the company until the policy is issued to him. *Detroit v. Mutual Fire Ins. Co.* (Mich.), 45 N. W. Rep'r, 356, and cases cited.

Where it appeared that the insured was unable to read and write, and the application was made out by the agent of the insurance company, who testified that he read it over to the insured, while the latter testified that the agent did not so read it, and he had no knowledge of its contents, there being thus a conflict of evidence on this point, and the jury having found for the plaintiff, held that, if the insured was not aware of the contents of the application, he would not be bound by statements therein. *State Ins. Co. v. Jordan* (Neb.), 45 N. W. Rep'r, 792. To same effect, *Phoenix Ins. Co. v. Golden* (Ind.), 23 N. E. Rep'r, 503. Where the agent of a mutual company, who had made out an application for the insured in another company two years before, and had then been told that there was an incumbrance on the property, made a new application to the defendant company, without asking the insured any questions, and stated therein that there was no incumbrance, such misrepresentation will not avoid the policy. *Russell v. Detroit Mutual Fire Ins. Co.* (Mich.), 45 N.

W. Rep'r, 356. In the following case it was held, that a prior policy on the same property obtained through the same agent could not be put in evidence to show knowledge on the part of the agent as to the state of the title. *Western Ass. Co. v. Stoddard* (Ala.), 7 So. Rep'r, 379.

Persons engaged in the insurance business, who, though not agents of the defendant company, are in the habit of submitting to it applications for its action, and who receive a part of the premium on such as are accepted by it, are the agents of the defendant as to the applications so accepted, so as to charge it with their knowledge regarding the insured premises. *Indiana Ins. Co. v. Hartwell* (Ind.), 24 N. E. Rep'r, 100.

No insurance agent can be expected by his company to attend to all the details of his business in person. The company must and should be held to anticipate the employment of clerks to attend to the office when the agent is absent or sick. When the agent's clerk is authorized and intrusted to examine property, and write out a policy thereon, his contract and knowledge are the contract and knowledge of the agent, and any accidental mistake which he may make is the mistake of the agent, and will be corrected in a court of law in an action on the policy. *Deitz v. Providence Washington Ins. Co.* (W. Va.), 11 S. E. Rep'r, 80. In this case the clerk, while intending to write the name of the wife in the policy, who was the owner of the property insured, accidentally wrote the name of the husband; it was held that the mistake would not defeat a recovery on the policy. *Ibid.*

G. applied to B., who was an insurance broker, for insurance in a certain amount. B. made application to L. & M., who were agents of the defendant company, for the insurance, obtained the policy and delivered it to G. B. was not the agent of the defendant but was in the habit of submitting applications as in this case, and when accepted he received fifteen per cent of the premium. Held, that he was the agent of G. in obtaining the insurance, but that his agency ceased when the policy was delivered, and that notice to him of its cancellation was not notice to the holder of the policy. *East Texas Fire Ins. Co. v. Blum* (Tex.), 13 S. W. Rep'r, 572.

A provision in a policy that the insured shall keep the property insured to the amount of four-fifths of its value or be a co-insurer as to the deficit, and in case of loss, bear his proportion of such loss, may be waived by parol by the agent of the company effecting the insurance. *Stanbiller v. Mutual Mill Ins. Co.* (Wis.), 45 N. W. Rep'r, 221.

See further, as to waiver of conditions by agents. *Philadelphia Tool Co. v. British American Ass. Co.* (Penn.), 19 Atl. Rep'r, 77; *Western Ass. Co. v. Stoddard* (Ala.), 7 So. Rep'r, 379.

2. Action on policy — limitation — parties — venue — evidence. — Where a policy of fire insurance provides that action thereon must be brought within a specified time after the loss occurs, the limitation runs from the date of the fire, although, under other provisions of the policy, the cause of action does not accrue until some time after the fire. *Travelers' Ins. Co. v. California Ins. Co.* (N. D.), 45 N. W. Rep'r, 708.

A contract of fire insurance made in Iowa, the statutes of which state provide in what counties an action may be brought on the policy, does not limit the right to bring an action for loss of the property to that state. The action is

transitory in its nature, and may be brought wherever service may be had on the company. *Insurance Co. v. McLimans* (Neb.), 44 N. W. Rep'r, 991.

A mortgagee, to whom a loss is made payable, may sue alone on a policy when his claim exceeds the amount of the loss. *Travelers' Ins. Co. v. California Ins. Co.* (N. D.), 45 N. W. Rep'r, 708. See, also, *Southern Fertilizer Co. v. Reames* (N. C.), 11 S. E. Rep'r, 467.

Where several policies are taken out in different companies, without any relation to each other, on the same property, they are independent contracts, and the policy in one company cannot be received in evidence to explain or vary what is contained in the other. *Westinghouse Electric Co. v. Western Ass. Co.* (La.), 7 So. Rep'r, 73.

Where by the policy the recovery cannot exceed the cost of reproducing the property destroyed, evidence as to the market or cash value of the property is improper. *Chippewa Lumber Co. v. Phoenix Ins. Co.* (Mich.), 44 N. W. Rep'r, 1055.

3. **Apportionment of loss.**—The following cases involve questions as to the apportionment of the loss. *Illinois Mut. Ins. Co. v. Hoffman* (Ill.), 24 N. E. Rep'r, 413; *Hoffman v. Minneapolis Mut. Fire Ins. Co.* (Minn.), 44 N. W. Rep'r, 67; *Westinghouse Electric Co. v. Western Ass. Co.* (La.), 7 So. Rep'r, 73; *Parks v. Hartford Fire Ins. Co.* (Mo.), 12 S. W. Rep'r, 1058.

4. **Application.**—Where the application is filled out by the agent of the company who writes down false answers and fraudulently procures the assured to sign it, the policy cannot be avoided on the ground that the answers are false. *Dwelling-House Ins. Co. v. Gould* (Penn.), 19 Atl. Rep'r, 793. So where the assured signs an application in blank which the agent afterward fills up. *Rogers v. Phoenix Ins. Co.* (Ind.), 23 N. E. Rep'r, 498. To the same effect: *Spratt v. New Orleans Ins. Co.* (Ark.), 13 S. W. Rep'r, 799. A false representation in the application as to the assured's interest in the property, when the truth was made known to the company's agent at the time, will not avoid the policy. *Western Ass. Co. v. Stoddard* (Ala.), 7 So. Rep'r, 379.

5. **Arbitration.**—A policy provided that, in case the parties could not agree, the amount of the loss or damage should be determined by arbitrators, whose award should be binding and conclusive as to the amount of such loss or damage, and that the loss should not be payable and no suit brought therefor until such award was obtained. The provision was held to be reasonable and valid and binding upon the parties. *Chippewa Lumber Co. v. Phoenix Ins. Co.* (Mich.), 44 N. W. Rep'r, 1055. The following cases support this conclusion: *Canal Co. v. Coal Co.*, 50 N. Y. 252; *Insurance Co. v. Wolff*, 14 Atl. Rep'r, 561; *Dry Dock Co. v. Union Assurance Co.*, 66 Cal. 253; *Davenport v. Insurance Co.*, 10 Daly, 535; *Gauche v. Insurance Co.*, 4 Woods, 102; *Carroll v. Insurance Co.*, 18 Pac. Rep'r, 868; *Holmes v. Ricket*, 56 Cal. 307; *Insurance Co. v. Creighton*, 51 Ga. 95; *United States v. Robeson*, 9 Pet. 319; *Lovejoy v. Insurance Co.*, 11 Ins. L. J. 186; *Gasser v. Sun Fire Office*, 44 N. W. Rep'r, 252.

For a case where the provision was held too indefinite to be enforced, see *Case v. Manufacturers' Fire & Marine Ins. Co.* (Cal.), 21 Pac. Rep'r, 848; 22 Pac. Rep'r, 1083.

As to what will constitute a waiver of the condition, see *Tilley v. Connecticut Fire Ins. Co.* (Va.), 11 S. E. Rep'r, 120; *Pioneer Manf. Co. v. Phoenix Ass.*

Co. (N. C.), 10 S. E. Rep'r, 1057; Chippewa Lumber Co. v. Phoenix Ins. Co. (Mich.), 44 N. W. Rep'r, 1055.

As to what will constitute a "difference" between the parties within the meaning of such a provision and as to its construction generally, see *Pioneer Manf. Co. v. Phoenix Ass. Co.* (Va.), 10 S. E. Rep'r, 1057.

According to the terms of certain policies, if the insured and the agent of the insurer present to adjust a loss, should be unable to agree, the former was to deposit with the agent \$10 to pay the expenses of an appraisal of the loss, and the agent was thereupon to appoint three appraisers, who should immediately repair to the field where the loss occurred, and appraise the loss or damage. Held, that an appraisal without notice to the insured of the appointment of appraisers, and of the time when they were to make the examination, was void. *Schreiber v. German-American Hail Ins. Co.* (Minn.), 45 N. W. Rep'r, 708.

6. *Assignment of policy.*—The consent of the company to an assignment of the policy given after the assignment is made, has the same effect as though given before. *Dwelling-House Ins. Co. v. Gould* (Penn.), 19 Atl. Rep'r, 793.

After a policy was issued the assured mortgaged the property, and the agent of the company wrote in the policy, "loss, if any, payable to N. W., mortgagee." Subsequently, the assured sold the property and went to the same agent, informed him of the sale and requested him to fix the policy so that the mortgagee would be secure; the agent said it was all right as it was. It was held that the company was estopped from avoiding the policy. *Phoenix Ass. Co. v. Wachter* (Penn.), 19 Atl. Rep'r, 289.

7. *Cancellation and forfeiture.*—A policy cannot be canceled without notice to the assured. *Scott v. Sun Fire Office* (Penn.), 19 Atl. Rep'r, 360; *East Texas Fire Ins. Co. v. Blum* (Tex.), 13 S. W. Rep'r, 572.

Forfeitures are not favored, and courts will not declare a policy of insurance forfeited unless compelled to do so. *Springfield Fire & Marine Ins. Co. v. McLimans* (Neb.), 45 N. W. Rep'r, 171. If the company, with knowledge of a cause of forfeiture, insists upon any of the provisions of the policy, it thereby treats the contract as in force and waives the forfeiture. *McFarland v. Kittinging Ins. Co.* (Penn.), 19 Atl. Rep'r, 796; *Schreiber v. German-American Hail Ins. Co.* (Minn.), 45 N. W. Rep'r, 708.

A policy provided as follows: "This insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with the expenses of writing the risk." Held, that the "expenses of writing the risk," included the commission paid to the agent, and not merely the cost of writing the policy. *State Ins. Co. v. Homer* (Col.), 23 Pac. Rep'r, 788.

8. *Conditions — construction and effect.*—A policy provided that the assured should not be entitled to recover of the company "any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, * * * without reference to the solvency or liability of other insurers." The agent of the defendant company represented to the plaintiff that the policy in suit was canceled, which was not true. Thereupon he obtained other insurance, representing that his property was not insured. The latter insurance was void from the beginning, because this repre-

sentation was not true in fact. Held, that such other insurance was not to be taken into consideration in estimating the defendant's liability; that the words of the condition did not refer to supposed contracts of insurance which never became valid, but only to such as had become avoided by breach of condition. *Parks v. Hartford Fire Ins. Co. (Mo.)*, 12 S. W. Rep'r, 1058.

Where a builder contracts with the owner of lots to furnish the material, and erect thereon a house, and said builder, desiring a contractor's insurance on the building, goes with the owner to an insurance agency, and makes application for such insurance, and the agents issue a policy in the name of the owner, and insert therein a clause, "contractor's insurance for thirty days," and the intention is to indemnify the contractor against loss by fire for thirty days, and at the expiration of that time indemnify the owner against loss by fire on said building for three years, held, that such a policy may be enforced for the benefit of the builder. Held, also, that, to explain and give effect to such a policy, oral evidence may be resorted to. *Germania Fire Ins. Co. v. Thompson (Kans.)*, 23 Pac. Rep'r, 608.

In answer to a question in the application for insurance, "Is there a \$1,000 incumbrance on the property?" the assured answered that there was over \$2,000 incumbrance on it. There was in fact over \$5,000 incumbrance on the property. Held, a misrepresentation which avoided the policy. *Smith v. Agricultural Ins. Co. (N. Y.)*, 23 N. E. Rep'r, 888. To the same effect, *Hayward v. Ins. Co.*, 10 Cush. 444; *Brown v. Ins. Co.*, 11 Cush. 280; *Abbott v. Ins. Co.*, 3 Allen, 218; *Fates v. Ins. Co.*, 7 Allen, 46; *Jacobs v. Ins. Co.*, 7 Allen, 133; *Sautell v. Ins. Co.*, 16 Hun 516. A change in the items of incumbrance without changing the aggregate amount will not avoid the policy. *Dwelling-House Ins. Co. v. Gould (Penn)*, 19 Atl. Rep'r, 798.

A policy provided that coal, kerosene or carbon oil should not be kept or used upon the premises without a written permission indorsed on the policy "excepting the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void." Attached to the policy was a printed slip signed by the defendant company as follows: "Privileged to use kerosene oil for lights, lamps to be trimmed and filled by daylight only." There was also indorsed: "Privileged to keep not exceeding five barrels of oil on said premises."

The insured property was destroyed by a fire caused by drawing kerosene in the oil-room of the premises near a lighted lantern at about dusk. The oil was drawn by persons acting under the authority of a tenant of the assured and not for the purpose of being used on the premises. The trial court directed a verdict for the defendant, which was affirmed. *Gunther v. Liverpool, etc., Ins. Co.*, 184 U. S. 110.

Under a policy which does not forbid repairs *per se*, but imposes the condition on the insured to obtain the written consent of the company before doing any act which may increase the risk insured against, courts will not conclude that repairs, though very extensive, and bordering on reconstruction, operate an increase of risk, but will weigh the degree of care used by the insured while making such alterations, and all circumstances connected with the operation, and decide each case on the particular showing therein made. An addition or extension to an insured building does not of itself operate an

increase of the risk. The improvements made to the building in connection with the extension may decrease the risk. *Meyer v. Queen Ins. Co. (La.)*, 6 So. Rep'r, 899.

The defendant company insured the plaintiff upon its building, and upon its tools and machinery contained therein. It had no interest in the building except as lessee. The policy contained a provision that "if the assured is not the sole and unconditional owner of the property, or if the building stood on ground not owned in fee simple by the assured, or if the interest of the assured is not truly stated in the policy," then the policy should be void. The policy was issued without any written application or any representations by the assured, either written or oral. It was held that it would be presumed that the agent of the company issued the policy upon his own knowledge of the condition and title of the property, and that the policy was intended to cover such interest as the assured had therein, and that the above condition had no application to the case. *Philadelphia Tool Co. v. British-American Ass. Co. (Penn.)*, 19 Atl. Rep'r, 77.

9. "Vacant and unoccupied."—An exhaustive note on the construction of these and similar words in insurance policies will be found in 1 Am. R. R. & Corp. Rep. 294. A mere temporary absence of the occupant will not avoid the policy. *Springfield Fire & Marine Ins. Co. v. McLimans (Neb.)*, 45 N. W. Rep'r, 171. Where the premises are occupied in the same manner when burned as when insured and the manner of occupancy was known to the agent who placed the insurance, no forfeiture can be insisted upon. *Fritz v. Home Ins. Co. (Mich.)*, 44 N. W. Rep'r, 139. A representation of the agent as to the effect of a rule of the company allowing a vacancy of thirty days upon a condition of the policy as to vacancy, held not a waiver of the condition or binding on the company, as it was a mere opinion touching the company's legal liability. *Rogers v. Phoenix Ins. Co. (Ind.)*, 23 N. E. Rep'r, 498.

10. Construction of the contract—general principles.—A contract of insurance, in case of ambiguity is to be taken against the company and in favor of the assured. *Philadelphia Tool Co. v. British Am. Ass. Co. (Penn.)*, 19 Atl. Rep'r, 77; *Meyer v. Queen Ins. Co. (La.)*, 6 So. Rep'r, 899; *Springfield Fire & M. Ins. Co. v. McLimans (Neb.)*, 45 N. W. Rep'r, 171. Though a policy provides that in certain contingencies it shall be null and void, yet it is not absolutely void upon the happening of such contingency, but only voidable at the election of the insurer. *Schreiber v. German-American Hail Ins. Co. (Minn.)*, 45 N. W. Rep'r, 708. Where a policy is upon a building and its contents and it is avoided as to the building by a breach of condition, it is avoided as to the contents also. *Western Ass. Co. v. Stoddard (Ala.)*, 7 So. Rep'r, 879.

11. Foreign companies — statutory provisions applicable to. — In an indictment under section 292, chapter 34, General Statutes 1878 (Minn.), as amended by chapter 54, Laws 1879, for acting as the agent of an insurance company not of this state, without the proper certificate of authority from the insurance commissioner, it is immaterial that the company had or had not complied with the statute. *State v. Johnson (Minn.)*, 45 N. W. Rep'r, 711.

A statute of Wisconsin requires that a true copy of any application or representation of the assured, which by the terms of the policy is made a part thereof, shall be attached to or indorsed upon the policy, or the company

shall be precluded from pleading or proving the same or the falsity thereof in any action upon the policy. It was held that the statute applied to a contract of insurance made without the state by a foreign insurance company upon personal property within the state. *Stanhilber v. Mut. Mill Ins. Co. (Wis.)*, 45 N. W. Rep'r, 221.

A statute of Pennsylvania prohibited foreign insurance companies from doing business in that state until they had complied with certain conditions and imposed a penalty for its violation. Held, that the statute did not render a policy void which was issued by an Iowa company upon property in the former state, without complying with the law, there being no prohibition against persons receiving policies from a foreign company before it was qualified to do business, and the whole purpose of the statute being for the protection of persons obtaining insurance. *Pennypacker v. Capital Ins. Co. (Iowa)*, 45 N. W. Rep'r, 408.

12. Insurable interest.—Where an agricultural implement dealer, having in his possession a stock of goods, some of which are his own, and some are held by him for sale on commission, obtains insurance thereon in his own name, and no fraudulent concealment or other fraudulent intent is alleged, the policy is not necessarily void; and, under the circumstances of this case, he may recover the value of his own goods destroyed by fire, not exceeding the amount of his policy. *St. Paul Fire & Marine Ins. Co. v. Kelly (Kans.)*, 23 Pac. Rep'r, 1046.

13. Mistake—reformation of policy.—Where there is a mutual mistake in drawing up a policy, it may be corrected in a court of equity. *German Fire Ins. Co. v. Gueck (Ill.)*, 23 N. E. Rep'r, 112; *Noel v. Pymatuning Mut. Fire Ins. Co. (Penn.)*, 18 Atl. Rep'r, 1054.

14. Notice and proof of loss.—Where a policy provides that notice of loss shall be forthwith given to the secretary of the company, it is a sufficient compliance to send a notice direct to the company. *Lewis v. Burlington Ins. Co. (Iowa)*, 45 N. W. Rep'r, 749. Notice of loss served on the general agent of the company is the same as service on the company. *Insurance Co. v. McLimans (Neb.)*, 44 N. W. Rep'r, 991. Where a policy requires notice of loss to be given "forthwith," it means in a reasonable time. *Pennypacker v. Capital Ins. Co. (Iowa)*, 45 N. W. Rep'r, 408. See, also, *Western Ass. Co. v. Studebaker Bros. Manf. Co. (Ind.)*, 23 N. E. Rep'r, 1138. Where a policy of fire insurance provides that "any fraud or attempt at fraud, or any false swearing, on the part of the assured," shall cause a forfeiture of all claims under the policy, a willfully false statement in the proof of loss, after the fire, of some pretended losses, will completely forfeit the entire policy, even though the actual losses, truly stated, exceeded the entire amount of the policy. *Dolloff v. Phoenix Ins. Co. (Me.)*, 19 Atl. Rep'r, 396.

Where the evidence shows that proofs of loss were mailed to the company in due time, and the company's officers and clerks who received its mail testified that no such proofs were received, a verdict for the plaintiff will not be disturbed. *Pennypacker v. Capital Ins. Co. (Iowa)*, 45 N. W. Rep'r, 408.

If the company denies its liability on independent grounds it thereby waives the condition requiring proofs of loss. *Deitz v. Providence Washington Ins. Co. (W. Va.)*, 11 S. E. Rep'r 50; *Coryeau v. Providence Washington Ins. Co.*

(Mich.), 44 N. W. Rep'r, 492; *German Fire Ins. Co. v. Gueck* (Ill.), 28 N. E. Rep'r, 112. Where the assured furnishes proofs of loss which he in good faith intends as a compliance with the policy, it is the duty of the company to at once notify him of its objections thereto, or it will be estopped from insisting that they are not in compliance with the policy. *Dwelling-House Ins. Co. v. Gould* (Penn.), 19 Atl. Rep'r, 793. The limitation as to the time of presenting proofs of loss may be waived by the conduct of the company in its efforts to effect a compromise. *Guinn v. Phoenix Ins. Co.* (Iowa), 45 N. W. Rep'r, 880.

15. *Other insurance.* — A policy contained these words: "Total concurrent insurance, \$4,000." There was also a provision that if the assured should obtain any additional insurance without the consent of the company indorsed, the policy should be void. The policy in suit was for \$1,000, and when it was issued the assured already had \$3,000 upon the property. Afterward assured obtained another policy for \$1,000. It was held that the words "concurrent insurance" meant insurance in force at the same time upon the same property for the benefit of the same parties or interest; that the policy sued on with the \$3,000 previously in force made up the total permitted without consent of the company, and that the additional \$1,000 was a violation of the condition and avoided the policy. *East Texas Fire Insurance Co. v. Blum* (Tex.), 13 S. W. Rep'r, 572.

16. *Suit to recover back loss paid.* — In an action by an insurance company to recover back money paid for losses upon property destroyed, which it was claimed had not been covered by the policy, the testimony on that point being nearly equally divided, and the jury having found for the defendant, held, that the verdict would not be set aside as being against the weight of evidence. *Nebraska, etc., Ins. Co. v. Segard* (Neb), 45 N. W. Rep'r, 681.

17. *Whether suit will lie for premium.* — A fire insurance policy at a gross premium for the term of five years, the insured giving two notes for the premium, contained a clause that, in case of default to pay any note, the insurance should be suspended, and the premium considered as earned, but that, on subsequent full payment, the policy should be revived and in force as to losses happening thereafter. Held, that upon a default to pay a premium note, the insurer can recover the amount of it. *Minnesota Farmers' Mut. Ins. Ass'n v. Olson* (Minn.), 44 N. W. Rep'r, 672.

MOBILE & OHIO RAILROAD CO. v. PEOPLE EX REL, ETC.

(24 N. E. R. 642; — Ill. —.)

1. *RAILROAD COMPANIES. DUTY AS TO ESTABLISHING AND MAINTAINING STATIONS.* It is the duty of railroad companies to establish and maintain stations at such points as will best accommodate the public, and it cannot be compelled to continue a station which does not meet this requirement.

2. *MOVING STATION.* A railroad company moved a station from a small village, about half a mile, where it was more convenient for the greater number of people using the station. The business of the village was not sufficient

to support a station. Held, that the company would not be compelled to keep up a station at the village.

THIS was a proceeding for a *mandamus*. It appeared that the railroad company originally located a station at a place called Hodge's Park. It had received donations of land and materials for a depot, and a village of nearly two hundred inhabitants had grown up around it. The company moved the station about half a mile, to a place called Unity, which would better accommodate all who used it, except those who lived at Hodge's Park. The object of the proceeding was to compel the company to continue a station at the village.

Lansden & Leek for appellant. *Geo. Hunt*, Attorney-General, for appellee.

SCHOLFIELD, J. Railway stations for the receipt and discharge of passengers and freight are for the mutual profit and convenience of the company and the public. Their location at points most desirable for the convenience of travel and business is alike indispensable to the efficient operation of the road and the enjoyment of it as a highway by the public. Necessarily, therefore, the company cannot be compelled, on the one hand, to locate stations at points, where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations, must, manifestly, rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point where the welfare of the company and country in general require that it should be changed to some other point. And so we have held that a railway company cannot bind itself by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. *Bestor v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309; *Marsh v. R. Co.*, 64 Ill. 414; *R. Co. v. Mathers*, 71 Ill. 592; same case again in 104 Ill. 257; *Snell v. Pells*, 113 Ill. 145. The power of election in the location of the line of the railway referred to in *People v. Louisville & N. R. Co.*, 120 Ill. 48; 10 N. E. Rep'r,

657, results from the franchise granted by the charter to exercise the right of eminent domain, and is, therefore, totally different from the power of locating stations, which, from its very nature, is a continuing one. And so we said in *Marsh v. R. Co.*, supra, where a bill had been filed for the specific performance of a contract to locate and maintain a station at a particular part: "Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require." And so, again, we said in *R. Co. v. Mathers*, supra: "Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established there, and no contract between a board of directors and individuals can be allowed to prohibit it." And in the very recent case of *People v. Chicago & A. R. Co.*, 22 N. E. Rep'r, 857, where we awarded a *mandamus* commending the location and maintaining of a station at a point where no station had before been located and maintained, we said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers are vested with a very broad discretion in the matter of locating, constructing and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public."

The rule has been so often announced by this court that it is unnecessary to cite the cases, that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established. If the right is doubtful, the writ will be refused. The burden was on the relator to prove a case authorizing the issuing of the writ, and in our opinion that proof has not been made. The evidence does show that there are, of all ages and sexes, one hundred and eighty-two persons residing in Hodge's Park who are by the change of the station a little beyond a half a mile further from the station; but the evidence not only fails to show that they are majority of the people resorting to that sta-

tion, for business or travel, or that they furnish the majority of the freight received or shipped at that station, but it shows directly the reverse. It is not shown that there are either mining or manufacturing interests that would be accommodated by retaining the station at Hodge's Park; and, so far as appears from the evidence, the business there is only that incident to the ordinary railway station in an agricultural community. The evidence shows that, with a few unimportant exceptions, the entire farming interests of the county accessible either to Unity or to Hodge's Park are best subserved by the change made of the station. Thus, John Hodge, a resident of Unity, who was sheriff of the county for ten years, and who also at one time filled the office of the county treasurer, and who was thoroughly acquainted with the county in the vicinity of Unity and Hodge's Park, testified: "The new station is more convenient for the great majority of the people. The distance between the two depot buildings is two thousand eight hundred and fifty feet. I know of none to whom Hodge's Park is more convenient than Unity besides the people of Hodge's Park. In going to Hodge's Park to transact business, nine-tenths of the people have to pass by Unity, and so in returning." M. Easterday, who resided in Cairo, but who was a real estate agent, and thoroughly familiar with the country and people in the vicinity of Unity and Hodge's Park, testified to the effect that the chief part of the farming country was nearer to Unity than to Hodge's Park, and that the roads and bridges favored travel to the former place; and he said: "Unity is as much nearer the greater portion of the improved surrounding country as the distance from Unity to Hodge's Park. I know of no one besides the people of Hodge's Park to whom the present station is less convenient than the former one. Unity is more convenient to the farmers of the community." As we understand the record, this evidence is not contradicted. Charles Hamilton, the superintendent of the respondent's road, testified, among other things: "There were two or three reasons for the removal of the station at Hodge's Park to the other location. There was but a little side track at Hodge's Park, and there is one half a mile long at Unity. At Hodge's Park the right of way is only fifty feet on each side of the track, and there was no room to build a side track, for the reason that the village street is on one side,

and a slough on the other. And besides, there was not business enough to sustain a station at both points." This evidence is unimpeached and uncontradicted in any respect, and must, therefore, be accepted as true. In *People v. Louisville & N. R. Co.*, and *People v. Chicago & A. R. Co.*, supra, the facts were settled by the pleadings, and left no question but that the public welfare required stations to be maintained at the points where we held they should be maintained, and there is, therefore, nothing in either of those cases that militates against our conclusion here.

The judgment of the circuit court is reversed, and the cause is remanded to that court with direction to enter judgment for the respondent.

HOME INS. CO. v. NEW YORK.

(10 Sup. Ct. R. 539 ; 134 U. S. 594.)

1. CORPORATIONS. TAXATION OF FRANCHISE OR BUSINESS. UNITED STATES BONDS. A statute of New York provided that all corporations, joint-stock companies and associations, with certain exceptions, should pay a tax upon their "corporate franchise or business," at the rate of one-fourth of a mill upon the capital stock, for each one per cent of dividends thereon, if the dividends amounted to six per cent or more, and fixing a different rate for those which paid less than six per cent or none at all. Held, that the tax was one upon the franchise or privilege of being a corporation and not upon the capital stock, and, therefore, that it was immaterial that a portion of the capital stock was invested in United States bonds not subject to state taxation.

2. CONSTITUTIONAL LAW. The statute in question is not obnoxious to the fourteenth amendment of the constitution of the United States, which declares that no state shall deprive any person of the equal protection of the laws. All corporations of the same kind are subject to the same tax.

THE plaintiff in error, the Home Insurance Company of New York, is a corporation created under the laws of that state. Its capital stock during the year 1881 was \$3,000,000, divided into thirty thousand shares of the par value of \$100 each, all fully paid. In the months of January and July of that year a dividend of \$150,000 was declared by the company, making together ten per cent upon the par value of its capital stock. A portion of

that capital stock was invested in bonds of the United States, amounting, when the dividend was declared, in July, 1881, and also on the 1st of November of that year, to \$1,940,000. By an act of the legislature of New York passed May 26, 1881 (chapter 361), amending a previous act providing for the taxation of certain corporations, joint-stock companies and associations, it was declared that every corporation, joint-stock company or association then or thereafter incorporated under any law of the state, or of any other state or country, and doing business in the state, with certain designated exceptions not material in this case, should be subject to a tax upon "its corporate franchise or business," to be computed as follows: If its dividend or dividends made or declared during the year ending the 1st day of November amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per cent of the dividends. A less rate is provided where there is no dividend, or a dividend less than six per cent, and also where the corporation, company or association has more than one kind of capital stock, as for instance, common and preferred stock, and upon one of them there is a dividend amounting to six or more per cent, and upon the other there is no dividend, or a dividend of less than six per cent. The purpose of the act is to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there are no dividends, according to the actual value of the capital stock during the year. We are concerned in this case, however, only with the tax where the amount is computed by the extent of the dividends. The tax payable by the Home Insurance Company, estimated according to its dividends, under the above law of the state, aggregated \$7,500. The company resisted its payment, assuming that the tax was in fact levied upon the capital stock of the company, and contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States bears to its capital stock; and that the law requiring a tax without such reduction is unconstitutional and void. An agreed case was accordingly made up, embodying a statement of the facts, between the company and the attorney-general of New York, representing the state, and submitted to the supreme court

of the state. That court gave judgment in favor of the state against the company, which, on appeal to the court of appeals of the state, was affirmed. 92 N. Y. 328. The judgment of the latter court having been remitted to the supreme court, and entered there, the case is brought to this court for review on writ of error.

B. H. Bristow and *David Willcox* for plaintiff in error. *Chas. F. Tabor* and *D. O'Brien* for defendant in error.

Mr. Justice FIELD, after stating the facts as above, delivered the opinion of the court.

The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and, therefore, invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded, there would be no question as to the invalidity of the tax. That the bonus or obligations of the United States for the payment of money cannot be the subject of taxation by a state is familiar law, settled by numerous adjudications of this court. It is a tax upon the exercise of the power of congress to borrow money; a tax which, if permitted, could be limited in amount only by the discretion of the state, and might, therefore, be carried to an extent impairing, if not destructive of, the efficiency of the power, to the serious detriment of the general government. As held in *McCulloch v. Maryland*, 4 Wheat. 436, the states have no power by taxation to impede, burden or in any manner control, the operation of the constitution and laws enacted by congress to carry into execution the power vested in the general government, a doctrine which, applied in *Weston v. City Council*, 2 Pet. 449, annulled a tax levied by the authority of a law of South Carolina on stock issued for loans to the United States. Nor can this inhibition upon the states be evaded by any change in the mode or form of the taxation, provided the same result is effected; that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached; and, if that would trench upon a power of the government, the law creating it will be set aside, or its enforcement restrained. Thus, in *Henderson v. Mayor, etc.*, 92 U. S. 259, 268, a statute of New York provided that the master or

owner of any vessel bringing passengers from foreign ports into the port of New York should give a bond in the sum of \$300 for each passenger landed, against his becoming a public charge for four years thereafter, or pay within twenty-four hours thereafter \$150 for each passenger, and that, if neither bond was given nor payment made, a penalty of \$500 for such failure would be incurred, which should be a lien upon the vessel. It was contended that the object of the requirement was not taxation, but protection against pauperism, and, therefore, valid as within the police power. But the court said that, in whatever language the statute may be framed, its purpose must be determined by its reasonable and natural effect, and, judged by that criterion, the tax was either on the owners of the vessel, for the right of landing passengers, or upon the passengers themselves, and that, therefore, the statute was a regulation of commerce, and void. To the same purport is the familiar case of *Brown v. Maryland*, 12 Wheat. 419, so often cited in this court, where it was contended that a license tax required of an importer to sell his goods while held in bulk as imported was a tax only upon his occupation. But the court observed that this was only changing the form, without varying the substance, of the tax, adding that "it is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax, in terms, upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it as a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year. By the term "corporate franchise or business," as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing busi-

ness in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such a body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by the exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal. As was said in *Delaware Railroad Tax Case*, 18 Wall. 206, 231: "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property; and the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state. Our only concern is with the validity of the tax. All else lies beyond the domain of our jurisdiction." It is true, as said by this court

in *California v. Railroad Co.*, 127 U. S. 41; 8 Sup. Ct. Rep'r, 1073; that the taxation of a corporate franchise has no limitation but the discretion of the taxing power; and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose. It may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the state. It cannot be furnished by the federal tribunals. The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed, and put into real property or bonds of New York, or of the other states. From the very nature of the tax, being laid upon a franchise given by the state, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the state over its corporate franchise, and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other.

In some states the franchises and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks. They were so declared by a law passed in 1866, and made liable to taxation to an amount not exceeding the gross sum of the surplus earned, and in the possession of the banks. The law was sustained by the court of appeals of the state in *Bank v. City of Rochester*, 37 N. Y. 365, 367, although the bank had a portion of its property invested in United States bonds. In its opinion the court observed that, in declaring the privileges and franchises of a bank to be personal property, the legislature adopted no novel principle of taxation; that the powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the legislature saw fit so to enact; that, such taxation being within the power of the legislature, it might prescribe a rule or test of their value; that all franchises were not of equal value, their value depending in some instances upon the nature of the business authorized, and the extent to which permission was given to multiply capital for its prosecution; and

that, the tax being upon the franchises and privileges, it was unimportant in what manner the property of the corporation was invested. And the court added: "It is true that, where a state tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist. But this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed." And again: "It must, therefore, be regarded as sound doctrine to hold that the state, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the state. If the grantee accepts the boon, it must bear the burden."

This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society v. Coite* and *Institution v. Massachusetts*, which were before this court at the December term, 1867. 6 Wall. 594, 611. In the first of these cases, it appeared that a law of Connecticut of 1863 provided that savings banks in that state should make an annual return to the comptroller of public accounts "of the total amounts of all deposits in them, respectively, on the 1st day of July in each successive year," and should pay to the treasurer of the state a sum equal to three-fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the 1st day of July, 1863, the Society for Savings, one of the banks, had invested over \$500,000 of its deposits in securities of the United States, which were declared by congress to be exempted from taxation by state authority, whether held by individuals, corporations or associations. 12 Stat. 346. Upon the amount of its deposits thus invested the society refused to pay the sum equal to the prescribed percentage. In a suit brought by the treasurer of the state to recover the tax, the payment of which was thus refused, the supreme court of Connecticut held that the tax was not on property, but on the corporation as such. The case being brought here the judgment was affirmed, this court holding that the tax was on the franchise of the corporation, and not

upon its property, and the fact that a part of the deposits was invested in securities of the United States did not exempt the society from the tax. Said the court: "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government. Authority to that effect resides in the state independent of the federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in federal securities." It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was determined by their amount. But the court said: "Reference is evidently made to the total amount of deposits on the day named, not as the subject-matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens. Views of the defendants are that the sum required to be paid to the treasury of the state is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition. Different modes of taxation are adopted in different states, and even in the same state, at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the state, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period. Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. Existence of the power is beyond doubt; and it rests in the discretion of the legislature whether they will levy a fixed sum, or, if not, to determine in what manner the amount shall be ascertained." Page 608.

In the second case mentioned (*Institution v. Massachusetts*) it appeared that the statute of Massachusetts, passed in 1862, levy-

ing taxes on certain insurance companies and depositors in savings banks, provided that every institution for savings incorporated under its laws should pay to the commonwealth a tax of one-half of one per cent per annum on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for the six months preceding the 1st day of May, and the other half on the average amount of its deposits for the six months preceding the 1st day of November. The Provident Institution for Savings in that state was authorized to invest its deposits in securities of the United States. Its average amount of deposits for the six months preceding the 1st day of May, 1865, was over eight millions, of which over one million was invested in such securities. It paid all the taxes demanded except on the portion which was thus invested. Upon that it declined to pay the tax. In a suit brought by the commonwealth to recover the same, the supreme judicial court of the state held that the tax was one on the franchise of the company, and not on property, and, therefore, gave judgment for the commonwealth. The case being brought here, the judgment was affirmed. In deciding the case this court said, referring to a section of the statute under which the tax was levied: " 'Deposits,' as the word is employed in that section, are the sums received by the institution from depositors without regard to the nature of the funds. They are not capital stock, in any sense, nor are they even 'investments,' as the word is there used, which simply means the sums received, wholly irrespective of the disposition made of the same, or their market value." And, speaking of the difference existing between taxes upon franchises and taxes upon property, it said: "Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the state treasury. They differ from property taxes, as levied for state and municipal purposes in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection." And again: "Comparative valuation in assessing property taxes, is the basis of computation in ascertaining the amount to be contributed by an individual; but the amount of a franchise tax depends upon the business transacted by the corporation, and the extent to which they have exercised the privileges granted in their charter." Pages 631, 632. The court also referred to a

decision made by the supreme court of the state to the effect that the assessment imposed was to be regarded as an excise or duty on the privilege or franchise of the corporation, not as a tax on the moneys in its hands belonging to the depositors. It was the corporation, it said, that was to make the payment; and, if it failed to do so, it was liable not only to an action for the amount of the tax, but might also be enjoined from the future exercise of its franchise until all taxes should be fully paid. *Com. v. Bank*, 5 Allen, 431. And the court held that the valuation of the property had nothing to do with determining the amount of the tax, but that the amount depended on the average amount of deposits for the six months preceding the respective days named, and that there was no necessary relation between the average amount of the deposits and the amount of property owned by the institution; and, not being a property tax, it was to be considered as a franchise tax laid upon the corporation for the privileges conferred by its charter, which, by all the authorities, it was competent for the state to tax, irrespective of what disposition the institution had made of its funds, or in what manner they had been invested.

In *Hamilton Co. v. Massachusetts*, 6 Wall. 632, a statute of Massachusetts, which required corporations having a capital stock divided into shares to pay a tax of a certain percentage upon the excess of the market value of such stock over the value of its real estate and machinery was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the excess of the market value consisted of securities of the United States; this court, however, placing its decision upon the fact that, under the provisions of the state constitution, and the practice under it, the tax had been so considered by the highest tribunal of the state. This decision goes much further than is necessary to sustain the judgment of the court of appeals of New York in the present case. In this case, we hold, as well upon general principles as upon the authority of the first two cases cited from 6 Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not, therefore, subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.

Nor is the objection tenable that the statute, in imposing such

tax, conflicts with the last clause of the first section of the fourteenth amendment of the constitution of the United States, declaring that no state shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are "persons," within the meaning of this amendment. It has been so decided by this court. *Mining Co. v. Pennsylvania*, 125 U. S. 181; 8 Sup. Ct. Rep'r, 737. But the amendment does not prevent the classification of property for taxation — subjecting one kind of property to one rate of taxation, and another kind of property to a different rate — distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And, when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike, under similar circumstances and conditions in respect to the privileges conferred upon them, and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint-stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions, in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See *Barbier v. Conolly*, 113 U. S. 32; 5 Sup. Ct. Rep'r, 357; *Soon Hing v. Crowley*, 113 U. S. 709; 5 Sup. Ct. Rep'r, 730; *Railroad Co. v. Humes*, 115 U. S. 523; 6 Sup. Ct. Rep'r, 110; *Railroad Co. v. Mackey*, 127 U. S. 209; 8 Sup. Ct. Rep'r, 1161; *Railroad Co. v. Beckwith*, 129 U. S. 32; 9 Sup. Ct. Rep'r, 207.

Judgment affirmed.

MILLER, J. Mr. Justice Harlan and myself dissent from the judgment in this case because we think that, notwithstanding the peculiar language of the statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company.

Taxation of corporations and corporate securities.— A law of Pennsylvania provided that all moneyed securities should be subject to an annual state tax of three mills on the dollar of their actual value, except bonds and other secu-

rities issued by corporations, which should be taxed at three mills on the dollar of their nominal or par value. The latter tax was to be paid by the corporation out of any interest payable on the bonds. The law was held not to be in conflict with the constitution of the United States, either because the tax was on the face value of the bonds, instead of their actual value, or because there was no provision for notice to the owners of the bonds. *Bell's Gap R. Co. v. Pennsylvania*, 184 U. S. 282.

Whether a corporation is doing business within a state so as to subject it to taxation therein under its revenue laws is a question considered in *People v. American Bell Tel. Co.*, 117 N. Y. 241, and *Standard Underground Cable Co. v. Attorney-General*, 19 Atl. Rep'r. 738.

WESTERN UNION TEL. CO. V. REID ET AL.

(10 S. E. R. 920; 88 Ga. 401.)

1. TELEGRAPH COMPANIES. MISTAKE IN TRANSMITTING MESSAGE. DAMAGES. Where goods ordered by telegraph were sent to the wrong place, in consequence of an error of the company in repeating the dispatch at an intermediate point, and sending it forward, the measure of damages is not the full value of the goods at the place to which they should have been sent, with no deduction for their value at the place to which they were actually sent. A person injured by the negligent act of another must use reasonable diligence to repper the damage as little as practicable, after discovery of the negligence and its probable consequences.

MacIntyre & MacIntyre for plaintiff in error. *W. M. Hammond* for defendants in error.

BLECKLEY, C. J. Reid Bros. sent a telegram from Thomasville to New York, ordering sacks. In repeating the telegram at Savannah, there was an omission to show that it was sent from Thomasville. In consequence of this omission, the sacks were forwarded by common carrier to Savannah. In a suit by Reid Bros. against the company, a recovery was had upon the basis of the value of the sacks at Thomasville, without any deduction of their value at Savannah. We think this was error. The mistake was discovered in time to order the sacks to be forwarded from Savannah to Thomasville, or to direct the sale of them to be made at Savannah. Neither was done. Reid Bros. paid their correspondent for them, but took no measures to have them sold at Savannah, forwarded to Thomasville, or abandoned to the telegraph company. Surely, one of these measures was essential to a recovery of their full value at

Thomasville. The bill of lading was sent to them, and the title to the sacks is still in them. The carrier is responsible to them. Speaking generally, they have the sacks now. This being so, it would seem plain equity that the value of the sacks where they are should be deducted from the amount of the recovery. The authorities all hold that it is the duty of the injured party to exercise some degree of diligence in rendering the damage of a negligent act as little as practicable. *Marr v. Telegraph Co.*, (Tenn.), 3 S. W. Rep'r, 496. It is suggested that *Manufacturing Co. v. Rucker*, 80 Ga. 291; 4 S. E. Rep'r, 885, conflicts with this doctrine, but we think an examination of the case will show that it does not. See *Mather v. Butler Co.*, 28 Iowa, 253; *State v. Powell*, 44 Mo. 436. The principle which we seek to apply in this case is found in *Grey Tel.* 100; *Telegraph Co. v. Hobson*, 15 Gratt. 122. See *Leonard v. Telegraph Co.*, 41 N. Y. 544. The great fact which stands out before our minds is that wherever the sacks may be and whatever they may be worth, Reid Bros. still own them, have the title to them, and yet they have recovered of the telegraph company their full value. We think the measure of damages recognized by the court was not the proper one, and that there should be a new trial.

Judgment reversed.

See *Postal Tel. Cable Co. v. Lathrop*, 1 Am. R. R. & Corp. Rep. 376; *Western Union Tel. Co. v. Moore*, 1 Am. R. R. & Corp. Rep. 528; *Kemp v. Western Union Tel. Co.* ante; *Western Union Tel. Co. v. Reid*, ante.

DWINELLE V. NEW YORK CENTRAL, ETC., R. Co.

(24 N. E. R. 319; 120 N. Y. 117.)

1. CARRIERS OF PASSENGERS. SLEEPING-CAR PORTER IS SERVANT OF RAILROAD COMPANY. The plaintiff was a passenger on one of the defendant's trains from Geneva to New York, which had been detained by a washout. He also occupied a section in a sleeping-car attached to the train. It became necessary to remove to a special train for Utica, to which the porter assisted him. The two then had some words about the plaintiff's sleeping-car ticket, which the porter had and refused to give up. The journey was to be completed on a special train from Utica, and the plaintiff insisted on something as evidence of his right to sleeping-car accommodations. The porter then accompanied the plaintiff outside the train to introduce him to the sleeping-car conductor. The

porter pointed out the conductor and turned to go. The plaintiff insisted on something more, and took hold of his sleeve to detain him, whereupon the porter struck him a severe blow in the face, inflicting the injuries for which the suit was brought. Held, that the porter was the servant of the defendant when engaged in the performance of its duties and obligations toward its passengers, and that the defendant was liable for his acts while so engaged the same as if it employed and paid him.

2. Whether the porter was at the time engaged in the line of his duties as a servant of the defendant company was a question of fact for the jury.

3. CARRIER LIABLE FOR WILLFUL INJURY OF PASSENGERS BY SERVANT. A carrier, who undertakes to transport a passenger and intrusts the execution of the contract to its servants, is bound absolutely to protect such passenger from the misconduct and violence of such servants while engaged in performing the contract.

4. DUTIES INVOLVED IN THE CONTRACT OF CARRIAGE. It is the duty of the servants of the carrier to afford the passenger, or assist him in obtaining, such information as may be necessary to enable him to complete his journey successfully. In this case it cannot be said as matter of law that the porter had completed his duty to the plaintiff, but it is a question of fact for the jury whether he was acting at the time in the line of his duties.

THIS is an appeal from a judgment of the general term, first department, affirming a judgment dismissing plaintiff's complaint.

The facts proven upon the trial were that plaintiff purchased tickets for himself and wife from Geneva to New York, for a continuous passage in the ordinary car upon defendant's road, and also tickets for a section in a sleeping-car in the same train from the porter, there being no other person acting as conductor thereof, and paid him for the same. In due run, he would have reached the city of New York the next morning, but, upon awakening next morning, he learned the train was detained at Utica owing to a washout near Amsterdam; and the plaintiff, with the other passengers, after waiting until nearly noon, was informed by the porter of the sleeping-car that he was required to take another train to the washout, and there, after passing the washout, to take still another train to be carried to New York city. The porter took the hand baggage of plaintiff and his wife, and conducted them to the train they were required to take from Utica to the washout. The porter, carrying their luggage or parcels, conducted them to the sleeping-car which formed a part of the train plaintiff was required to take, but, not finding a vacant seat for the plaintiff and his wife in the sleeping-car, conducted them into an ordinary

coach forming a part of this train, and said to plaintiff, very likely another sleeper would be put on to the train, and then the plaintiff could have a seat in it. There were no vacant seats in this car, but a gentleman gave his seat to the plaintiff's wife, and the plaintiff remained standing. The porter deposited their luggage at the end of the car near the door. The porter then turned to go away from plaintiff, and walked toward the rear end of the car. Plaintiff then stepped after the porter, pulled his sleeve slightly, whereupon the porter turned toward the plaintiff, and the plaintiff said to the porter: "You have my sleeping-car ticket. I have nothing to show on the other side of the washout that I am entitled to sleeping-car accommodations. I wish you to give me something before you leave me. Give me back my ticket, so that I can have sleeping-car accommodations on the other side of the washout." The porter replied: "I keep that ticket to show to the company." The plaintiff said to the porter: "If you cannot give me that, then take me to the ticket-office here, and tell them how things are, and ask them to give me some check or ticket which I can show to the conductor on the other side of the washout." The porter refused to go to the office with the plaintiff as requested, and then the plaintiff requested the porter to make the plaintiff acquainted with the sleeping-car conductor who was going upon the train, and the porter replied that he would show the plaintiff the conductor. The plaintiff and the porter thereupon left the car and walked along by the side of the train, and, as they were passing along, the porter pointed out a group of men wearing railroad uniforms, and said: "There is the conductor." Plaintiff then said to the porter: "He does not know me. Take me to him, and make me acquainted with him, and tell him I am entitled to a section to New York." The porter turned to go away, saying: "That is none of my business." Plaintiff then said, touching the porter lightly on the arm: "You must not leave me without some satisfaction in this business." The porter thereupon said, "Take your hand off me, or I'll hit you," and struck the plaintiff a violent blow in the face, knocking the plaintiff down, and rendering him unconscious. These acts were done and declarations made in the yard of the defendant at Utica, which at the time contained the depot and station, trains, cars, offices and employes of the defendant, and numerous other passengers who

had been detained at this point on account of the washout. The plaintiff also introduced in evidence an agreement between the defendant and the New York Central Sleeping-Car Company, the provisions of which that bear upon the questions in this case will be referred to in the opinion, and stated. The defendant moved for a dismissal of the complaint upon the ground that the plaintiff had made out no cause of action against the defendant; that the cause of action stated in the complaint had not been made out; that the act complained of was not done within the scope of the authority of the person who did the act; that the act complained of was not done by any servant of the defendant within the scope of his or any authority he had; that the act complained of was not done by any servant of the defendant while engaged in performing any duty which the defendant owed to the plaintiff; that the act complained of was not an act to be foreseen, or provided or guarded against, by the defendant.

Hugh L. Cole for appellant. *Frank Loomis* for respondent.

POTTER, J. (after stating the facts as above). The defendant was under contract obligations to transport the plaintiff with his wife from Geneva to the city of New York, and it had entered upon the performance of the contract when further performance was temporarily suspended until the defendant could make arrangements to overcome the difficulty and obstruction caused by the washout of its road-bed. While this was being done the plaintiff was a passenger of the defendant, and entitled to all the rights which pertain to a passenger upon a train moving toward the point or destination specified in the contract of carriage. Among the obligations which such a contract imposes upon the carrier are "to protect the passenger against any injury from negligence or willful misconduct of its servants while performing the contract, and of his fellow-passengers and strangers, so far as practicable; to treat him respectfully; and to provide him with the usual accommodations, and any information and facilities necessary for the full performance of the contract upon the part of the carrier." And these obligations continue to rest upon the carrier, its servants and employees, while such contract continues and is in process of performance. *Thorpe v. Railroad Co.*, 76 N. Y. 402; *Stewart v.*

Railroad Co., 90 N. Y. 588; *Parsons v. Railroad Co.*, 113 N. Y. 355; 21 N. E. Rep'r, 145; *Thomp. Carr.* 50; *Railway Co. v. Krouse*, 30 Ohio St. 222. There cannot be any serious question that such are the ordinary duties and obligations between the passenger and the carrier. The relation of the plaintiff and defendant being that of passenger and carrier, with the duties and obligations to each other resulting from such relation, these questions arise and require consideration in the determination of this case: Was the sleeping-car porter the agent of the defendant? And, if so, was he engaged in the performance of his duties as such agent at the time of inflicting the blow upon the plaintiff?

The answer to the first question is that the porter of a sleeping or drawing-room car, even in cases where there is a contract, like the contract put in evidence by the plaintiff in this case, between the railroad company, which sells a passage ticket in its ordinary coaches to a passenger, and the proprietors of a sleeping-car, who sell a ticket to the same passenger for a seat and berth in a sleeping-car running in the same train, is the servant of the railroad company. This question has been definitely settled by the highest court in this state and of the United States. *Thorpe v. Railroad Co.*, 76 N. Y. 406; *Pennsylvania Co. v. Roy*, 102 U. S. 451. The contracts in those two cases are in all essential respects like the contract in this case. The railroad company in those cases, as in this case, did not own the drawing-room or sleeping-car, nor did it hire or pay the porter. The contract required that the servants employed by the sleeping-car company should be acceptable to the railroad company, with other stipulations, of a correlative character, not necessary to be specified. In those cases it was held that the law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad and constitute a part of its train, to evade the duty that is imposed upon it by law, and that the defense that the porter was not the servant of the railroad company, but of the sleeping or drawing-room car company, is not a defense to the railroad company; or, rather, in the language of Judge Andrews, "that the persons in charge of the drawing-room car are to be regarded and treated, in respect to their dealings with pas-

sengers, as the servants of the defendant (the railroad company), and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company." And this court in the same case (*Thorpe v. Railroad Co.*, *supra*), holds that the act of 1858, chapter 125, introduced by the plaintiff in the case under consideration, authorizing railroad and sleeping and drawing-room car companies to make contracts of that character, carefully provided that it should not be construed to exonerate the railroad company from the payment of damages for injuries in the same way and to the same extent as if the cars were owned and provided by the railroad company. These cases hold, as matter of law, that the porter of the sleeping-car is, in the performance of the duties and obligations of the railroad company under its contract to carry a passenger, the servant of the railroad.

The second of the above questions is, was the sleeping-car porter engaged in the performance of his duties as such agent at the time of inflicting the blow upon the plaintiff? That question must in this and similar cases depend upon the evidence, and must be determined by the jury. The office of the court is to determine what facts are proper to be submitted to the jury for its determination of that question. We think the evidence in this case should have been submitted to the jury. The evidence was to this effect: That the defendant had contracted to carry the plaintiff to New York; that the contract had not been performed, but was in process of performance; that the porter was actually engaged in the performance of services to that end; that, owing to the interruption of the train upon which the defendant was carrying the plaintiff to his destination, it became necessary to transfer the plaintiff to another train; that porter so informed plaintiff, and was transferring the plaintiff to the other train, with his luggage; that porter was the person of whom the plaintiff purchased and paid for his seat and berth, and to whom the plaintiff had surrendered it upon demand, and was, in short, the only person with whom the plaintiff had any business relations upon the train, and was the only person who represented the defendant, or whom the defendant had in any manner put forward or presented in the sleeping-car to perform the duty and service which the defendant owed the plaintiff. Upon these and other facts developed upon

ing taxes on certain insurance companies and depositors in savings banks, provided that every institution for savings incorporated under its laws should pay to the commonwealth a tax of one-half of one per cent per annum on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for the six months preceding the 1st day of May, and the other half on the average amount of its deposits for the six months preceding the 1st day of November. The Provident Institution for Savings in that state was authorized to invest its deposits in securities of the United States. Its average amount of deposits for the six months preceding the 1st day of May, 1865, was over eight millions, of which over one million was invested in such securities. It paid all the taxes demanded except on the portion which was thus invested. Upon that it declined to pay the tax. In a suit brought by the commonwealth to recover the same, the supreme judicial court of the state held that the tax was one on the franchise of the company, and not on property, and, therefore, gave judgment for the commonwealth. The case being brought here, the judgment was affirmed. In deciding the case this court said, referring to a section of the statute under which the tax was levied: " 'Deposits,' as the word is employed in that section, are the sums received by the institution from depositors without regard to the nature of the funds. They are not capital stock, in any sense, nor are they even 'investments,' as the word is there used, which simply means the sums received, wholly irrespective of the disposition made of the same, or their market value." And, speaking of the difference existing between taxes upon franchises and taxes upon property, it said: "Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the state treasury. They differ from property taxes, as levied for state and municipal purposes in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection." And again: "Comparative valuation in assessing property taxes, is the basis of computation in ascertaining the amount to be contributed by an individual; but the amount of a franchise tax depends upon the business transacted by the corporation, and the extent to which they have exercised the privileges granted in their charter." Pages 631, 632. The court also referred to a

decision made by the supreme court of the state to the effect that the assessment imposed was to be regarded as an excise or duty on the privilege or franchise of the corporation, not as a tax on the moneys in its hands belonging to the depositors. It was the corporation, it said, that was to make the payment; and, if it failed to do so, it was liable not only to an action for the amount of the tax, but might also be enjoined from the future exercise of its franchise until all taxes should be fully paid. *Com. v. Bank*, 5 Allen, 431. And the court held that the valuation of the property had nothing to do with determining the amount of the tax, but that the amount depended on the average amount of deposits for the six months preceding the respective days named, and that there was no necessary relation between the average amount of the deposits and the amount of property owned by the institution; and, not being a property tax, it was to be considered as a franchise tax laid upon the corporation for the privileges conferred by its charter, which, by all the authorities, it was competent for the state to tax, irrespective of what disposition the institution had made of its funds, or in what manner they had been invested.

In *Hamilton Co. v. Massachusetts*, 6 Wall. 632, a statute of Massachusetts, which required corporations having a capital stock divided into shares to pay a tax of a certain percentage upon the excess of the market value of such stock over the value of its real estate and machinery was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the excess of the market value consisted of securities of the United States; this court, however, placing its decision upon the fact that, under the provisions of the state constitution, and the practice under it, the tax had been so considered by the highest tribunal of the state. This decision goes much further than is necessary to sustain the judgment of the court of appeals of New York in the present case. In this case, we hold, as well upon general principles as upon the authority of the first two cases cited from 6 Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not, therefore, subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.

Nor is the objection tenable that the statute, in imposing such

for his comfort and safety. This duty of protecting the personal safety of the passenger, and promoting by every reasonable means the accomplishment of his journey, is continuous, and embraces other attentions and services than the occasional services required in giving the passenger a seat, or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it. The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing, or had completed the performance of it, when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely, and to protect, the person of the plaintiff, and was a violation of such contract. Hence we think the court should not have dismissed the complaint, but should have submitted these facts and the circumstances attending the blow to the jury, upon the question whether or not the porter was in the performance of his duties as the defendant's agent when the blow was inflicted. The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

1. **Willful violence to passenger by servants of carrier.**—The carrier is liable for willful acts of violence inflicted by its servants upon a passenger when the servant is acting within the line of his duty or when the act violates the carrier's duty towards the passenger. *Shirley v. Billings*, 8 Bush, 147; *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307; *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546; S. C., 9 Ill. App. 250; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 117; *Bryant v. Rich*, 106 Mass. 180; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588; *Schultz v. Third Ave. R. Co.*, 89 N. Y. 242; *Hoffman v. New York Central R. Co.*, 87 N. Y. 35; *Croaker v. Chicago, etc., R. Co.*, 36 Wis. 657.

In *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546, the plaintiff, who was riding as a passenger on a freight train, lost his watch and accused the brakeman of having it. The latter thereupon struck the plaintiff with a lantern. The company was held liable for the assault. The court says:

"The appellant was a common carrier of passengers. As such it was not an insurer against any possible injury that a passenger might receive while on the train, but the company was bound to furnish a safe track, cars and machinery of the most approved quality, and place the trains in the hands of skillful engineers and competent managers—the agents and servants were bound to be qualified and competent for their several employments. Again, the law requires appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow-passengers who might be on the train, and if the agents of appellant in charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So, too, the contract which existed between appellant as a common carrier and appellee as a passenger, was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train. Any other rule might place the traveling public at the mercy of any reckless employe a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger."

In *Smith v. Louisville, etc., R. Co. (Ind.)*, 24 N. E. Rep'r, 753, the complaint was as follows: "The plaintiff complains of the defendant and says that, at the time of the grievances hereinafter set out, the defendant was a corporation owning and operating a line of steam railroad from New Albany, Ind., to Mt. Vernon, Ill., and as such was a common carrier of freight and passengers; that on the 8th day of May, 1887, the plaintiff, not being in the employment or service of the defendant, was, by the invitation and permission of the conductor of such train, riding upon a certain freight train of the defendant for the purpose of being carried from New Albany to a station on defendant's railroad called 'Milltown;' that, while so upon said train, and using due care and without his fault, the plaintiff was violently assaulted by one J. A. Turner, a servant of the defendant on said train, and was, with the wicked and malicious purpose of injuring plaintiff, thrown from said train and under the moving wheels, whereby he was mangled and bruised, and caused great bodily and mental pain, and was forced to submit to the amputation of one of his legs, to his damage in the sum of \$8,000. The plaintiff avers that the other servants of the defendant upon said train had full knowledge of the wicked and unlawful intention of said Turner to assault and injure the plaintiff, but wholly failed and refused to interfere or protect this plaintiff, and, by their negligence in so failing and refusing to deter the said Turner from his evil design, caused the injury to plaintiff aforesaid. The plaintiff avers that said injury was not caused by any negligence of the plaintiff, but solely by the negligence and willful misconduct of the defendant and his servants as aforesaid." The complaint was held bad on demurrer because it did not show

that the plaintiff was a passenger, and also because it did not show that the servant who committed the assault, was, at the time, acting in the line of his duty.

Where the plaintiff was importunate in getting his baggage checked and a servant of the company struck him to gratify his own resentment, it was held that the company was not liable. *Railroad Co. v. Wetmore*, 19 Ohio St. 110. See, also, *Hudson v. Railroad Co.*, 16 Kans. 470.

2. *Liability of railroad companies for negligence of employees of sleeping-car companies.* — On this subject see *Thorpe v. New York Central, etc.*, R. Co., 76 N. Y. 402; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Railroad Co. v. Walrath*, 88 Ohio St. 461; *Louisville, etc., R. Co. v. Katzenberger*, 16 Lea, 380. In all of these cases it is held that the employees of the sleeping-car company are the servants of the railroad company, as between it and its passengers, in so far as such employees are concerned in performing the contract of transportation. The above cases are stated in note to *Pullman Palace-Car Co. v. Lowe*, 1 Am. R. R. & Corp. Rep. 194, paragraphs 10, 11, 12 and 22.

METROPOLITAN RY. CO. V. KNEELAND ET AL.

(24 N. E. R. 331; 130 N. Y. 134.)

1. *CORPORATIONS. LIABILITY OF DIRECTORS FOR WRONGFULLY AUTHORIZING THE ISSUE OF NOTES.* The directors of a railroad company voted, without authority, to pay their president a salary of \$25,000. Subsequently the board authorized the president to issue and negotiate the notes of the company for the purpose of paying the salary. Notes were issued and came into the hands of *bona fide* purchasers for value before maturity. In a suit by the corporation against the directors it was held that the directors were liable to the extent of the liability imposed on the corporation, and that an action could be maintained before the corporation had paid any thing on account of the notes.

2. Directors who did not vote for the issue of the notes though they voted for paying the salary, would not be liable.

ASIDE from certain facts alleged by way of inducement, the substantial allegations of the complaint are that from the 8th of November, 1882, until in August, 1884, the defendant Kneeland was a stockholder, director and the president of the plaintiff, a railroad corporation, organized under the laws of this state; that as president he was not called upon to perform any duties connected with the active management or operation of the road, and there was no salary attached to his office by any resolution or action either of the stockholders or directors; that his predecessors in office had never received any salary, and that the plaintiff

never agreed to pay him a salary as its president, or to pay him for his services; that on the 5th of June, 1884, all of the defendants were directors of the plaintiff, and, with the exception of Mr. Gillett, attended a directors' meeting at which the following resolution was unanimously adopted, viz.: "Resolved, that S. H. Kneeland, the president of this company, shall be paid a salary of \$25,000 per annum from the time of his election as such;" that on the 18th of the same month, at another meeting of the directors, all of the defendants being present except Duggin and Slayback, it was unanimously resolved "that the president be and he is authorized to use the credit of the company by issuing and negotiating its notes, or otherwise, for paying the salary of the said president, said notes to be signed by the president and countersigned by the treasurer in the usual way and form, and not to exceed the limit of the amount heretofore authorized;" that prior to the adoption of the latter resolution, as well as subsequently, notes officially signed and countersigned by the president and treasurer, respectively, were issued to the amount, in the aggregate, of \$43,950, and are now due and unpaid; that said notes were retained by said Kneeland, and applied to his own use, and, while some of them are held by certain of the defendants, others were negotiated before maturity, and passed into the hands of *bona fide* purchasers for value, without notice; that payment of some of said notes has been demanded of the plaintiff, and suits threatened thereon, and actions have actually been brought against it upon two thereof; that said Kneeland was never entitled to demand or receive from the plaintiff any salary or compensation for services as such president, and that the company was under no liability to him either for salary or compensation, as the defendants knew, or were bound to know as directors, and that their action in voting to pay him a salary, and in directing the issue of notes for that purpose, was illegal, a breach of trust, and a violation of their duty as directors; that said notes are invalid in the hands of all persons except *bona fide* purchasers, without notice, before maturity, and for a valuable and sufficient consideration; that the aforesaid action of the defendants was a fraud upon the plaintiff, and that, in consequence thereof, it has incurred a liability to pay such of said notes as have come into the hands of *bona fide* purchasers, without notice, for a good consideration, and be-

fore maturity ; that some of said notes were "paid over by the said Kneeland to some of the defendants in payment of or to secure the payment" of precedent indebtedness of said Kneeland to such defendants, and that they are still under the control "of the defendants or some of them," and have not passed into the hands of *bona fide* purchasers. The relief demanded is that "an account be taken of said notes, and that it be ascertained and determined which of said notes came into the hands of *bona fide* purchasers, * * * and that this plaintiff have judgment against these defendants for * * * \$43,950, with interest from June 5, 1884, or for such a sum as plaintiff is liable to pay to the holders of said notes." There is also a prayer for general relief. The defendants demurred to the complaint — Slayback, Duggin and Kneeland, separately — upon the ground that it does not state facts sufficient to constitute a cause of action ; that two causes of action are improperly united ; and that there is a defect of parties, both plaintiff and defendant. Upon the trial an interlocutory judgment was entered, sustaining the demurrer as to all of the defendants, with leave to amend in twenty days, but directing that the complaint should be dismissed unless the plaintiff should amend the same during said period. Upon the expiration of twenty days, the plaintiff having omitted to amend, final judgment was entered dismissing the complaint, with costs.

Edward S. Rapallo for appellant. *Francis C. Barlow* and *Nelson S. Spencer* for respondents.

VANN, J. (after stating the facts as above). This is an action against the directors of a corporation for fraudulently issuing and negotiating promissory notes in its name, which, on reaching the hands of *bona fide* purchasers for value, became legal obligations against the company. The substantial question presented by the demurrer is whether such an action can be maintained upon an allegation of liability to pay without an allegation either of payment or of actual loss. In an action for the conversion of a promissory note by wrongfully negotiating it to a *bona fide* holder for value, the maker need neither allege nor prove that he has paid it, but it is sufficient if he avers that he is legally liable to pay it. *Decker v. Matthews*, 12 N. Y. 313. The *gravamen* of such an action, as was held in the case cited, is the wrongful act of the de-

fendant in causing a note without value, except to a *bona fide* holder, to become valuable by the sale thereof to such a purchaser as could enforce it against the plaintiff. It was also held in that case that a cause of action accrued to the maker as soon as he became liable upon the note through the transfer thereof, and that neither the right of action nor the measure of damages depended upon the fact of payment. This case was relied upon by the court when it rendered judgment in *Farnham v. Benedict*, 107 N. Y. 159; 13 N. E. Rep'r, 784, where the defendant, being in possession, without title, of certain town bonds that had been fraudulently issued through his procurement, and which were void in fact although apparently valid, sold them to *bona fide* purchasers, and thus rendered them valid and binding upon the town so that it was compelled to pay them. It was held that he was liable to the town for the amount of the bonds, and Judge Rapallo, speaking for the court, said that immediately on the negotiation of the bonds a cause of action accrued in favor of the town, either in the nature of an action of trover for the face of the bonds, or as for money had and received, for the money realized by him on the sale, according to the rule laid down in *Comstock v. Hier*, 73 N. Y. 269. In *Thayer v. Manley*, 73 N. Y. 305, the defendant, by means of false and fraudulent representations, induced the plaintiff to execute and deliver to him three negotiable promissory notes, but before any of them became due the plaintiff demanded them from the defendant, who refused to deliver them. He still held the notes at the time of the trial, but one of them had become due after the commencement of the action. It was held that, as the defendant had it in his power, when the suit was commenced, to dispose of the notes to a *bona fide* holder in whose hands they would have been valid, and as the plaintiff was then entitled to recover the actual damage which might accrue to him, this right was not impaired by the subsequent maturity of one of the notes before a transfer; that, as the judgment and a satisfaction thereof would transfer title to the notes to defendant, plaintiff was entitled to recover the full value, but that to avoid circuity of action a provision should be incorporated in the judgment giving to defendant the right to cancel and return the notes as a satisfaction of the damages. It was also held that the measure of damages in such an action is the face of the note and interest, unless it should

appear that it was of less value by reason of payment of the same, insolvency of the maker, or some other lawful defense. In *Betz v. Daily*, 3 N. Y. St. Rep'r, 309, it was held that in an action by a partner against his co-partner and certain third persons for fraudulently making notes in the name of the firm and negotiating them so that *bona fide* holders could compel the plaintiff to pay them, the cause of action was complete when the wrong was done, and that payment of the notes was not essential to a recovery. Some of the notes were paid by the plaintiff after the commencement of the action and before trial, but a verdict for the amount of all the notes fraudulently negotiated was sustained. The court said: "The plaintiff was not injured to the amount of moneys which he had paid out in taking up these fraudulent notes at the time of beginning the action. The injury to him was done when the notes were first negotiated." In *Town of Ontario v. Hill*, 33 Hun, 250, the defendants were held liable for wrongfully issuing the negotiable bonds of a town, some of which had fallen into the hands of innocent holders for value. It was determined that the cause of action accrued immediately upon the passing of the bonds into the hands of *bona fide* purchasers who could enforce them against the town. "In a legal sense," it was said, "the plaintiff had sustained damages by the action of the defendants when the bonds passed into the hands of persons who could enforce their payment against the town. The plaintiff's alleged right of action springs out of the defendants' breach of duty as public officers, and is in the nature of an action on the case for consequential damages." This case was subsequently reversed, but not on this point. 99 N. Y. 324; 1 N. E. Rep'r, 887.

While the case presented by this appeal may not be a strict action of conversion, it bears a close analogy to actions of that character when brought by the makers of negotiable promissory notes for the conversion thereof. What is the nature of the injury for which such an action lies? It is not the loss of the material substance of the note, which is simply a small piece of paper with a few words written thereon; neither is it the loss of a contract, or of the evidence of a contract, that the maker could enforce, because it is his own engagement, in form, but not even that in fact. The wrongful destruction of an article is ordinarily a conversion thereof, but the destruction of a note, that had had

no inception, would not be a conversion as to the maker, unless it might be deemed a conversion of the material substance only, which is not now important. The injury consists in the negotiation of the note, so that, according to the law merchant, it becomes a valid and enforceable contract against the maker, or, as in *Thayer v. Manley*, supra, in retaining possession after demand made so that the wrong-doer had the power to put it into lawful circulation. Wrongfully aiding in the negotiation of a note, or wrongfully making a note to be negotiated by others, would appear to be injuries of the same character.

What was the nature of the tortious act of which the defendants by their demurrer admit they were guilty? Those who voted for the resolution which in form authorized one of their number to issue and negotiate notes of the plaintiff, assumed to authorize, and, by authorizing, caused some of the notes in question to be issued and negotiated. They had no power, express or implied, to pass that resolution, or its predecessor which provided a salary for the president. They could not thus give away the property of the corporation. They could not bind the stockholders by voting to appropriate the assets of the company to an illegal purpose. *Butts v. Wood*, 37 N. Y. 317; *Coleman v. Railroad Co.*, 38 N. Y. 201; *Ogden v. Murray*, 39 N. Y. 202; *Kelsey v. Sargent*, 40 Hun, 150; *Gravel-Road Co. v. Branegan*, 40 Ind. 361; *Holder v. Railroad Co.*, 71 Ill. 106; *Association v. Stonemetz*, 29 Penn. St. 534; *Kilpatrick v. Bridge Co.*, 49 Penn. St. 118. Their action, as admitted on the record, was a violation of their duty as directors, a breach of trust, and a fraud upon the plaintiff. The result of their action was to cause notes to be made, purporting to be valid obligations of the plaintiff, although in fact void. While not the notes of the company, they appeared to be such, as they were issued by those having apparent authority. If nothing further had been done, however, the wrong would doubtless have been *injuria absque damno*; but the defendants who adopted the second resolution thereby authorized the negotiation of the notes, and some of them were negotiated accordingly, and reached the hands of *bona fide* holders for value. These notes, as is here admitted, the plaintiff has become liable to pay in consequence of the fraudulent conduct of those defendants. Thus the dead pieces of paper were, to this extent, given life, and converted into con-

tracts binding upon the company without its consent. In what respect do these wrongful acts differ from those which, in the cases cited, were held to authorize an action for conversion, or an action in the nature of conversion? Do they differ in the character of the injury inflicted, or loss sustained? Is there not in each the same presumption of damage springing from a liability wrongfully imposed? Were not all of these actions founded upon the fact that the maker, real or apparent, of a negotiable instrument, had, through the wrongful acts of another become chargeable, so that he could be compelled to pay such instrument, which would not have ripened into a valid obligation against him but for such wrongful act? We think that the cases relating to this subject rest upon the principle that a person who fraudulently places in circulation the negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a *bona fide* purchaser, is guilty of a tort, and, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value thereof. As the case under consideration fairly comes within this principle, it should be governed by it. The essential injury, common to all cases of this character, is the fraudulent imposition of liability. Hence there should be a common remedy, whether it is called an action in conversion, or in the nature of conversion, or a special action on the case. These views lead to a reversal of the judgment as to all of the defendants who voted for the resolution authorizing the president of the company to issue and negotiate its notes for the purpose of paying him a salary to which he was not entitled. The defendants Slayback and Duggin, who demur separately, but through the same attorneys and upon the same grounds as the other defendants, except Kneeland, did not vote for said resolution, although they voted for the resolution to pay the president a salary. This act, although wrongful, was harmless, so far as appears, until supplemented by further action in which they did not participate, and for which, upon the record as presented, they cannot be held responsible. The passage of the resolution for the payment of a salary, without specifying how it should be paid, did not bring the notes into existence, nor put them into circulation. No cause of action was set forth, therefore, as to those defendants, who are

not alleged to have had any connection with the act that resulted in making and negotiating the notes.

The judgment should be affirmed as to the defendants Slayback and Duggin, but, under the circumstances, without costs. As to all the other defendants the judgment should be reversed, and the demurrer overruled with costs, with leave to such defendants to withdraw their demurrer and serve an answer within thirty days upon payment of costs.

All concur, except Potter, J., not sitting.

Wilson v. Metropolitan El. Ry. Co., 120 N. Y. 145, is another suit growing out of the same transaction as the above case. Wilson sued the railroad company upon one of the notes referred to in that case, and the question was whether he was a *bona fide* holder for value without notice of the facts which impeached their validity. The plaintiff discounted the note in question for the individual benefit of the president, and, as such act was *prima facie* unlawful, he was put upon inquiry as to whether the president was in fact authorized to do what he did. The court held that the resolution authorizing the president to use the notes for the purpose of paying the salary recited to be due him from the company, was sufficient evidence of such authority and would estop the company from disputing the validity of the notes in the hands of one who gave value for them, relying upon such resolution; that it would be presumed that the plaintiff, if he had made inquiry, would have come to the knowledge of this resolution, and that he was entitled to the same protection as though he had seen and relied upon it. A quotation from the opinion in this case will be found in the note to Libbey v. Tobey, *ante*, at page 281.

NORTH V. PLATTE COUNTY.

(45 N. W. R. 692; — Neb. —.)

1. RAILROAD AID BONDS. IRREGULARITY IN ISSUING. A proposition to issue county bonds to aid in the construction of a railroad was: "To issue and give to the Lincoln and Northwestern Railroad Company, or to the Blue Valley and Northwestern Railroad Company, \$100,000 of coupon bonds of said Platte county," etc. It was submitted to the voters of Platte county, and adopted by the requisite majority, and the bonds issued duly certified, and delivered to the Lincoln and Northwestern Railroad Company, which built the proposed railroad. Held that, while the issuing and delivering of bonds voted under an alternative proposition would be enjoined if timely application was made for that purpose, yet as, by the terms of the proposition, the commissioners were authorized to issue and deliver the bonds to the one of the companies named which should build the road, and having

complied with such apparent authority, their action in the premises was voidable and not void; in other words, the bonds were liable to be set aside at any time before they were duly certified and had passed into the hands of an innocent purchaser for value.

2. EFFECT OF LACHES IN BRINGING SUIT. Where there has been great delay in bringing an action, relief may be denied, where had the application been seasonably made, it would have been granted.

A. J. Poppleton and *Chas. A. Speice* for plaintiff. *Wm. Leese*, Attorney-General, *J. M. Woolworth* and *M. B. Reese* for defendant.

MAXWELL, J. This is an original action, brought in this court to restrain the payment of interest coupons or bonds of Platte county, issued in aid of the Lincoln and Northwestern Railroad Company. It is alleged in the petition that "plaintiff is, and for many years past has been, the owner of real and personal estate situated and taxable in the county of Platte, and that he brings this action as well on his own behalf as on behalf of all other tax payers similarly situated who may come in and contribute to the expenses of the suit; * * * that heretofore, to-wit, on the 1st day of January, 1880, the said county of Platte, by the board of county commissioners [it being at that time under the government and management of a board of county commissioners] issued and delivered, either to the Lincoln and Northwestern Railroad Company, or to the Blue Valley and Northwestern Railroad Company, \$100,000 par value of the coupons of said county of Platte for the alleged purpose of aiding the construction of one of said railroads, commencing at a point on the line of the then existing Atchison and Nebraska railroad, and extending to the city of Columbus, in said county of Platte, said coupon bonds being dated on the 1st day of January, 1880, bearing interest from the date thereof at the rate of eight per cent per annum, payable at the office of the county treasurer, as provided by the terms and conditions of a proclamation hereafter set forth. Plaintiff further saith that the sole right, power and authority upon and under which said coupon bonds were voted, issued and delivered as aforesaid, was a proposition dated May 6, 1879, issued and submitted to the voters of said county of Platte at an election called and held on the 14th day of June, 1879, which among other things, provided that the question to be submitted should be: 'Shall

the county commissioners of Platte county, in the state of Nebraska, be authorized and required to issue and give to the Lincoln and Northwestern Railroad Company, or to the Blue Valley and Northwestern Railway Company, \$100,000 of the coupon bonds of said Platte county, to be dated the 1st day of January, 1880, bearing interest from date at the rate of eight per cent per annum, the interest payable annually at the office of the county treasurer of the county of Platte?' Said proposition was carried and adopted by the requisite and lawful number of votes, and the said bonds were ordered issued, and issued accordingly, and are still outstanding and unpaid. A true copy of said proposition so submitted as aforesaid, and under which said bonds were issued, is hereto attached and made a part of this petition, and marked 'Schedule A.' Plaintiff further alleges and charges that said proclamation and proposition under which said bonds were voted was and is insufficient and illegal, and the adoption and approval conferred upon said county and its commissioners no power or authority to sign, seal, issue and deliver said bonds to said railway companies, or either of them, or to any other person or corporation under the statutes of the state of Nebraska, and that said bonds, and all thereof, so issued and delivered as aforesaid, are absolutely void for lack of power to make the same, both in the hands of the donee thereof and in the hands of whomsoever they may reach."

The authority of the commissioners of Platte county, under the statute, to submit a proposition to the voters of said county, and of the electors thereof, to authorize by their voters the issuing of bonds to a designated railroad company in the amount of \$100,000 is not seriously questioned; but it is claimed on behalf of the plaintiff that the bonds in question are void because the terms of the proposition were in the alternative "to the Lincoln and Northwestern Railroad Company, or the Blue Valley and Northwestern Railway Company." In *Jones v. Hurlburt*, 13 Neb. 126; 13 N. W. Rep'r, 5, which was an appeal from a decree of the district court of Seward county, enjoining the delivery of the bonds of that county, and of certain precincts therein, upon the ground that the proposition to issue bonds in aid of certain railroads was in the alternative, it was held that the dual form of the proposition vitiated the election. In *Spurck v. Railroad Co.*, 14 Neb. 293; 15 N. W. Rep'r, 701, which was an appeal from

the district court of Butler county, enjoining the registration of the bonds of that county upon the ground that the proposition was in the alternative, the injunction was made perpetual. Lake, C. J., says: "The defendant had notice of the want of authority on the part of the commissioners, and is, therefore, not in a situation to complain." In *State v. Roggen*, 22 Neb. 118; 34 N. W. Rep'r, 108, which was an application for a *mandamus* to compel the defendant to certify certain bonds of Butler county, and of a precinct therein, issued to the Lincoln and Northwestern Railway Company, the writ was denied. The relator in that case had purchased the bonds in good faith, but as they were incomplete on their face, by reason of the want of the certificate of the auditor and secretary of state, it was held that she was not protected. but clearly implying that, had the bonds been duly certified — in other words, been perfect instruments — she would have been in the position of a *bona fide* purchaser for value.

The essential facts in each of these cases were substantially the same as in the case under consideration. A county, like any other corporation, necessarily must act through its agents. These agents for the purpose of issuing its bonds were the county commissioners. Such commissioners could issue the bonds of the county in aid of a work of internal improvement only upon the conditions named in the statute. Two companies proposed to build a railway from Lincoln to Columbus. "A plat of the survey, showing their exact line of route through Platte county," was required by statute to be filed two weeks before the election, and the line thus surveyed could not vary to exceed forty rods from such plat, as filed. So far as appears, but one line was surveyed, and but one plat filed in the clerk's office of that county. The owner of this line was to be one of two persons, and with this understanding the election in question was had, and the bonds in controversy declared carried, and issued to the company or persons which built the road. There was no want of power to issue the bonds, but the electors should have designated the donee. Instead of doing this, however, they, in effect, instructed the commissioners to issue the bonds to the corporation building the road, which the commissioners did. The commissioners, therefore, as agents of the county, acting under apparent authority, issued the obligations in question, and they are valid

in the hands of an innocent purchaser for value. The evil of a proposition in the alternative form, is that voters who may be hostile to one of the roads named, and who would vote against aid to such road, may be induced, by reason of the supposed probability of the railroad in which he is in favor being the successful line, to vote in its favor, and thus the proposition in that form may be adopted by the requisite majority, when, had propositions been submitted separately, both would have failed; in other words, electors may be induced to vote for the proposition by exciting false hopes as to the road that will be constructed, and thus carry the proposition by the necessary majority. Such bonds, however, are not void when duly certified, and have passed into the hands of innocent purchasers for value. In the able and carefully prepared brief of the attorney for the plaintiff, it is said that "municipal bonds issued without power clearly conferred by constitution or statute are void everywhere and in all hands." *Marsh v. Fulton Co.*, 10 Wall. 676; *Township of East Oakland v. Skinner*, 94 U. S. 255; *Lewis v. City of Shreveport*, 108 U. S. 282; 2 Sup. Ct. Rep'r, 634; and that was the holding of this court in *Reine-man v. Railroad Co.*, 7 Neb. 310, and *Hamlin v. Meadville*, 6 Neb. 227. It is also true, as he contends, the holder of municipal bonds is chargeable with notice of all provisions of statute and constitution in reference thereto. *Ogden v. County of Daviess*, 102 U. S. 634; *Dixon Co. v. Field*, 111 U. S. 82; 4 Sup. Ct. Rep'r, 315. But neither proposition is applicable to the facts of this case.

The action was brought nine years after the bonds were issued and delivered, and the plaintiff shows by his petition that he has been a tax payer of Platte county during "many years past." There are many cases holding that such delay and laches will defeat an action, where relief would have been granted had the application been seasonably made. *Supervisors v. Schenck*, 5 Wall. 772; *County of Clay v. Society*, 104 U. S. 579; *Johnson v. Stark Co.*, 24 Ill. 75; *Keithsburg v. Frick*, 34 Ill. 421; *Com. v. Pittsburgh*, 43 Penn. St. 391; *Steines v. Franklin Co.*, 48 Mo. 167; *Bradley v. Franklin Co.*, 65 Mo. 638; *Burr v. Carbondale*, 76 Ill. 455; *Railroad Co. v. Saunders Co.*, 16 Neb. 123; 19 N. W. Rep'r, 693. Upon the whole case no sufficient reason has been shown to justify the court in granting or continuing the injunction in force

in this case. The injunction is, therefore, dissolved, and the action dismissed.

The other judges concur.

See Calhoun v. Millard, post, and note; Brown v. Milliken, 1 Am. R. R. & Corp. Rep. 8, and note.

CALHOUN ET AL. V. MILLARD ET AL.

(34 N. E. R. 27; 121 N. Y. 60.)

1. MUNICIPAL BONDS. FORMER DECISION. Where a town procures suit to be brought against itself upon coupons, which it has furnished the money to buy and for the purpose of having its bonds declared void, and pays all the expenses of the suit, including attorneys' fees on both sides, a decision in such suit pronouncing the bonds void will not stand in the way of a re-examination of the merits of the questions on which the validity of the bonds depends.

2. WHEN EQUITY WILL REFUSE RELIEF AGAINST VOID BONDS. LACHES. The petition for the issue of bonds in aid of a railroad was adjudicated to be sufficient, the bonds were issued for stock of the railroad company and sold to *bona fide* holders for value, the town levied taxes and paid interest on them regularly for nine years, and also paid a small portion of the principal. The railroad was partly built and sold out on foreclosure. Between nine and ten years after the issue of the bonds a bill was filed by tax payers to procure a cancellation of the bonds and for other relief. It was held that, though the bonds were void, the laches and other circumstances of the case were such that equity, in the exercise of a sound discretion, would refuse the relief of cancellation.

3. STATUTORY BAR OF EQUITABLE ACTIONS. A statute fixing a limitation of ten years for equitable actions, does not preclude a court of equity from denying relief in accordance with equitable principles for unreasonable delay.

4. STATUTE GIVING REMEDY TO PREVENT ILLEGAL ACT, WASTE, ETC., BY OFFICERS OF TOWN. An act authorized tax payers to prosecute an action to prevent "any illegal official act" or "waste or injury to any property, funds or estate" of the town, etc. A tax had been levied and collected for the payment of interest on the bonds in question. Held, that payment of the interest would not be an "illegal act" or "waste" within the meaning of the statute, and an injunction to prevent such payment was refused.

I. H. Maynard for appellants. *John B. Gleason* for respondents.

ANDREWS, J. This action was commenced January 6, 1882, by the plaintiffs, certain tax payers of the town of Andes, in the county of Delaware, in behalf of themselves and all other tax-

payers in said town, against the Delhi and Middletown Railroad Company, the supervisor of said town, and certain other defendants, holders of bonds to the amount of about \$50,000, dated September 1, 1871, part of \$98,000 of bonds, with interest coupons attached, purporting to have been issued by commissioners in behalf of said town, under and in pursuance of chapter 907 of the Laws of 1869, in aid of the construction of the Delhi and Middletown railroad. The complaint sets forth that the bonds were issued without authority, and were void, for the reason among others, that the proper consents required by the act of 1869 were not obtained, and demanded equitable relief—First, that the defendant Ballantine, supervisor of said town, be restrained and enjoined from paying the interest falling due on such bonds March 1 and September 1, 1882, out of the sum of \$6,650 in his hands, levied and collected for the payment of such interest; and, second, that the bonds held by the individual defendants be decreed to be delivered up and canceled.

The question of the validity of the bonds of the town of Andes, issued under the act of 1869, was presented to and adjudicated by this court in the case of *Craig v. Town of Andes*, 93 N. Y. 405. It was there decided, for reasons disclosed in the prevailing opinion, that the bonds were void. That action was brought after the commencement of the present one, to recover interest on certain of the bonds which fell due March 1, 1882. It now appears from the evidence in this action that the *Craig* suit was brought at the instance of Ballantine, the supervisor of the town, and the trial judge found "that the coupons on which the action was brought were paid for out of the moneys of said town, and said action was prosecuted by attorneys paid by said town, and was defended by attorneys paid by said town, said town paying all the expenses thereof, and the suit was brought and defended for the purpose of procuring the bonds of said town to be declared invalid." We fully assent to the claim of the counsel for the bondholders, that an injunction obtained under such circumstances ought not to stand in the way of a re-examination by the court of the grounds upon which it proceeded; and if we were now satisfied either that upon the facts presented in that case the question of law was erroneously decided, or that facts not disclosed on the trial of the *Craig* case, but now brought out, would,

if then disclosed, have led to a different result, the circumstances stated would emphasize the duty of the court to correct its errors or to conform its judgment in the present case to the new circumstances. It is claimed that material facts bearing upon the validity of the bonds, not shown on the trial of the Craig case, were proved on the trial of the present one, prominent among which is the fact which now appears, that the railroad in aid of which the bonds were issued had been in fact legally located on the identical route specified in the conditional consents, prior to May 6, 1871, the date of the presentation of the petition and consents to the county judge. But we deem it unnecessary to determine whether the new facts presented affect the principle of our former decision, for the reason that we think the judgment below dismissing the complaint in this action was properly rendered, assuming the invalidity of the bonds.

It will be convenient to consider separately the two purposes of this action, viz., the surrender and cancellation of the bonds held by the individual defendants, and the separate and distinct relief by injunction to prevent the defendant Ballantine from applying the money in his hands to the payment of interest. The jurisdiction of a court of equity to compel the surrender and cancellation of written instruments obtained by fraud, or which, being void for any reason, may, if outstanding, subject the plaintiff to loss or injury, is very ancient, and has been frequently exercised. The plaintiff, seeking this relief, invokes the equitable powers of the court, and the court grants or refuses it, in the exercise of a sound discretion, according to the circumstances of the particular case. The granting of this relief cannot be claimed as a matter of "absolute right *ex debito justitiæ*, such as a party has to recover an amount due on a contract or for damages for a tort." The existence of jurisdiction, and the fact that the plaintiff makes out that the instrument of which he seeks the surrender and cancellation is void, are not conclusive of his right to final decree in his favor. The court may nevertheless refuse to exercise the jurisdiction, and leave the party to his defense at law, when the instrument is sought to be enforced against him. But, in entertaining or declining jurisdiction, the court does not act capriciously, but is guided by principles which have gradually been evolved in the course of adjudication. It is apart from our pres-

ent purpose to arrange or classify the cases upon the subject. The general grounds of jurisdiction, and the circumstances which justify equitable interference, or, on the other hand, the denial of equitable relief, are set forth in the text-books, and illustrated by decided cases. We refer to a few of the decisions in this court upon the subject. *Heywood v. City of Buffalo*, 14 N. Y. 540 ; *Town of Venice v. Woodruff*, 62 N. Y. 462 ; *Town of Springport v. Bank*, 75 N. Y. 397.

The facts in the present case present several elements which have entered into the consideration of the court in granting relief for the cancellation of written instruments. The bonds of the town of Andes are, as we have assumed, void, and since the commencement of this action they have been so adjudicated, but the adjudication is an estoppel only as between the parties to the action in which it was made. The other bondholders are not concluded, and may contest over again the question of the validity of the bonds. There exists, also, the further element that the bonds are not void on their face, and that, in a suit brought thereon, the proof of the adjudication of the county judge that the requisite consents had been obtained would presumptively establish performance of the condition as to consents in the bonding act, and cast upon the town the *onus* of disproving it, and showing that in fact the requisite consents had not been given. *Craig v. Town of Andes*, 93 N. Y. 410. It also appears by the record that the bonds are held by numerous parties, each of whom might bring an action at law to enforce them, unless prevented by the equitable interposition of the court for their cancellation. In the case of the *Town of Springport v. Bank*, 75 N. Y. 397 ; 84 N. Y. 403, the court sustained an action for the cancellation of town bonds, upon facts substantially similar to those presented in this case, with the important exception, however, that there the town had acted promptly in repudiating the bonds, and in seeking to review the proceedings under which the right to issue them was claimed. In that case the adjudication of the assessor was made March 13, 1871. The town procured a writ of *certiorari* to review and set aside the bonding proceedings April 13, 1871, and they were set aside in that proceeding by the judgment of this court in June, 1873. The defendants purchased the bonds in September, 1871, pending the litigation on the *certiorari*, and in

January, 1875, the suit for cancellation was commenced. The town had paid no interest on the bonds, and refused in any way to recognize their validity. This court, also, in the case of *Metzger v. Railroad Co.*, 79 N. Y. 171, affirmed a judgment canceling town bonds issued in aid of the Attica and Arcade Railroad Company, on the ground that they were issued without authority. The bonds in that case were delivered by town commissioners to the railroad company in exchange for its stock, March 21, 1874. The suit for cancellation was commenced in January, 1876, less than two years thereafter. The commissioners were joined with the railroad company as defendants in the action, and the complaint alleged collusion between the defendants to impose the bonds upon the town. The bonds had not been transferred by the company, and the town had paid no interest. The case of *Town of Mentz v. Cook*, 108 N. Y. 504; 15 N. E. Rep'r, 541, sustained a decision of the special term of the supreme court decreeing the cancellation of town bonds, on the ground of a defect in the petition by which the proceedings to bond the town were initiated. The road in aid of which the bonds issued had never been constructed, and, after paying interest on the bonds for a single year, the town repudiated its liability, and commenced an action for their cancellation.

The present case, for the first time in the history of the litigations growing out of the town bonding acts in aid of railroads in this state, presents the question whether the equitable remedy for cancellation may be refused by reason of long delay and acquiescence on the part of the town and its tax payers, accompanied meanwhile by frequent acts recognizing the validity of the obligations of which cancellation is sought, although the delay in bringing the action has not continued for the full statutory period of limitation of equitable actions. It is important to state the material facts bearing upon the question. The adjudication of the county judge that the persons who signed the petition in the bonding proceedings constituted a majority of the tax payers of the town of Andes, in number and amount of taxable property, was made May 22, 1871. The bonds (except a part not now material) were issued and delivered to the railroad company in exchange for its stock between June 13 and December 10, 1872. They were payable in thirty years from date, with semi-annual in-

terest at seven per cent. In each year for nine years and more a tax was levied on the town to pay the interest on the bonds, and it was regularly paid as it accrued up to September 1, 1881, and in 1878 the town-meeting voted a tax of \$3,000 to pay that amount of bonds, and they were so paid and retired. The railroad in aid of which the bonds were issued was never put in operation, but the company, during 1872, 1873 and 1874, expended in grading and other construction, within the town of Andes, a sum greater than the amount of bonds issued by the town. In 1874 a town-meeting was held pursuant to chapter 453 of the Laws of 1874, to determine whether the town commissioners should be authorized to sell the stock taken in exchange for the bonds, and it was decided that such authority should not be given. In 1875, on a new vote being taken under chapter 153 of the Laws of 1875, a sale was authorized. The stock was not sold, and in December, 1881, was practically extinguished by a sale of the railroad under a foreclosure. This action was commenced December 6, 1881, more than ten years after the adjudication of the county judge, and nine years and more, but less than ten years, after the issue of the bonds. The trial judge found that the individual defendants purchased the bonds held by them in good faith, paying therefor not less than par and accrued interest, without notice of any claim by the officers or tax payers of the town that there was any defense thereto, or any suspicion of their invalidity. It cannot be doubted that if obligations of an individual, having general power to contract, had been issued without his authority, but he had afterward permitted them to be dealt with by the public as valid securities, and had recognized their validity by frequent payment of interest, and by payment of a portion of the principal, these acts would have constituted a ratification of the unauthorized obligations, and have precluded the obligor from denying their validity. Under the decisions in this state, similar acts on the part of a town or other municipality, recognizing the validity of bonds issued under the bonding acts, would not estop the municipality issuing them from denying their validity on the ground that essential conditions provided in the bonding acts had not been complied with. By our decisions, the obtaining of consents to the extent and in the mode prescribed in the acts is of the very substance of the power conferred upon municipal corpora-

tions to issue bonds for the purposes contemplated, and bonds issued without the requisite consents are held to have been issued without authority. Municipal corporations, since they possess no general authority to issue such bonds, cannot, by recognition or subsequent ratification, validate obligations which they had no power to create. This point was involved in *Craig v. Town of Andes*, where the question of estoppel was raised and overruled, and the decision on this point accords with the tenor of the cases in this state. See *Weismer v. Village of Douglas*, 64 N. Y. 105; *Cagwin v. Town of Hancock*, 84 N. Y. 542; *Starin v. Town of Genoa*, 23 N. Y. 439. The dismissal of the complaint in this action cannot, therefore, rest upon the ground of estoppel or ratification, but the acts of the town, its long acquiescence, without action or protest, in the bonding proceedings, its repeated recognition of the validity of the bonds by payments, are pertinent considerations, where the court is called upon, after a long delay, to exert its equitable powers in decreeing their surrender and cancellation. It is and always has been the practice of courts of equity to remain inactive where a party seeking their interference has been guilty of unreasonable laches in making his application. *Story Eq. Jur.*, § 1520. The principle is stated with great force and clearness by Lord Camden in *Smith v. Clay*, Amb. 645; 3 *Brown Ch.* 640, note: "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." Courts of equity, it has been said, act not so much in analogy to, as in obedience to, statutes of limitation of legal actions, because, where the legal remedy is barred, the spirit of the statute bars the equitable remedy also.

In the present case the cause of action for the cancellation of the bonds was not barred by the ten-year statute applicable to equitable actions. But a period of nine years had elapsed, after the bonds were issued, before the commencement of the action. But we apprehend that the period of limitation of equitable actions fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period

short of that time shall be a bar to relief in any case, or precludes the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued. The ten-year limitation was primarily designed to shield defendants (*Railroad Co. v. Dudley*, 14 N. Y. 352), and it must be true that a court, in the exercise of its equitable jurisdiction, could not entertain or enforce a cause of action barred by the statute, and not within any exception, acting upon any general equitable considerations. But in enforcing purely equitable remedies, depending upon general equitable principles, unreasonable and inexcusable delay is an element in the plaintiff's case, which a court of equity always takes into consideration in exercising its discretion to grant or refuse relief, and is not a mere collateral incident. Where there is a remedy at law whereby the plaintiff can prosecute or defend his legal right, the refusal of relief leaves the parties where they were. If there are special circumstances which may change the situation of the plaintiff to his injury, unless the equitable remedy is interposed, this fact may be considered. But the right of the court to deny relief upon equitable grounds, for long delay, although short of the statute period of limitation, is in the nature of a defense, and is not, we think, taken away by the statute. There may be a well-founded distinction between the case of an application for an equitable remedy in aid of, or to enforce a legal right not barred by, statute, and the case where an exclusively equitable remedy is sought, such as to restrain proceedings at law, or, upon the principle *quia timet*, to deprive an adversary of the muniment of his alleged legal right, which he inequitably retains. In cases of the latter class, long delay or acquiescence, although short of the statute period for the limitation of equitable actions, may be a ground for refusing relief. 2 Pom. Eq. Jur., § 817. The cancellation of securities is a purely equitable remedy, and cannot be claimed as an absolute right, nor is it applied for or awarded in aid of a legal right or title. We conclude, therefore, that it was within the power of the court to dismiss the complaint, so far as relief was sought for a cancellation of the bonds, on the ground of delay in bringing the action. The circumstances justified the conclusion on this branch of the case. The town and the tax payers permit-

ted the bonds to be dealt with and taken by savings banks and others, for nearly ten years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition encouraged investment therein as safe and valid securities. The bonds, resting on the adjudication of the county judge, were apparently valid. The legislature has still the power to ratify them, and make them valid obligations of the town. *Williams v. Town of Duanesburgh*, 66 N. Y. 129; *Horton v. Town of Thompson*, 71 N. Y. 513; *Rogers v. Stephens*, 86 N. Y. 623. They are now in the hands of *bona fide* holders; that is, of persons who have paid value for them without notice. The fact that, if the plaintiffs are defeated here, the bonds may be sued upon and enforced in another jurisdiction, constitutes no equitable reason for maintaining the action. *Town of Venice v. Woodruff*, *supra*. The judgment denying relief for the cancellation of the bonds is incidentally supported by the opinion in *Craig v. Town of Andes*, wherein the learned judge by whom it was pronounced, referring to the judgment in the present case in the supreme court (28 Hun. 380), said: "Nor is the correctness of that decision in question here, for a court of equity might, in its discretion, refuse to interfere, and leave the party to its legal rights;" and in *Alvord v. Bank*, 98 N. Y. 599, Judge Finch recognizes the doctrine that a court of equity would not lend its aid in a case of inexcusable laches of the party seeking relief. The denial of relief in this case may result practically in the enforcement of the bonds in question, and also of other town bonds issued and held under similar circumstances. But in contrasting the relative conduct and situation of the town and the tax payers on the one side, and the purchasers of bonds on the other, we cannot say that such a result will be repugnant to any principle of justice or equity.

The right of the plaintiffs to maintain the action, so far as it seeks to enjoin and restrain the defendant Ballantine from paying the interest on the bonds, for the year 1882, out of the money in his hands, levied and collected for that purpose, depends upon the question whether such payment, if made, would be an illegal act, or constitute waste under chapter 531 of the Laws of 1881. This act, which superseded the original legislation on the subject, initiated by chapter 161 of the Laws of 1872, is entitled "An act for the protection of tax payers," and in its first

section authorizes an action to be prosecuted by tax payers against officers, agents, commissioners or other persons acting in behalf of any county, town, village or municipal corporation, "to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to any property, funds or estate of such county, town, village or municipal corporation." By act chapter 234 of the Laws of 1879, the office of railroad commissioner in the several towns in Delaware county was abolished, and the duties appertaining thereto were imposed upon the supervisors of the several towns. It was made the duty of the supervisor of each town to report to the board of supervisors each year the amount of interest on railroad bonds of the town falling due in that year, and the act provides that "the said amount shall be raised by tax as now provided by law, and paid by the collectors of the town to the said supervisors, and by them applied in payment of the interest and coupons as aforesaid." The defendant Ballantine, as supervisor of the town of Andes, in the fall of 1881 reported to the board of supervisors of Delaware county the amount required to be raised to pay the interest falling due on the railroad bonds of the town for the year 1882, viz.: The sum of \$6,650; and the board of supervisors, at its annual session in the fall of 1881, included in its warrant for the collection of taxes in the town of Andes the sum so reported, and this amount was duly collected and paid over to the supervisor pursuant to the direction of such warrant, for the purpose of paying the interest on the bonds, and the sum so collected remains in his hands. The plaintiffs, in their character as tax payers, seek to prevent the supervisor of the town of Andes from performing the duty imposed upon him by the act of 1879, and from applying the money to the purpose for which it was raised.

We are of the opinion that the payment by the supervisor of the interest on the bonds, out of the funds would neither be an illegal act, nor constitute waste, within the statute of 1881. The bonds were, under the adjudication of the county judge, presumptively valid obligations of the town. When the money in question was raised, their validity had not been impeached by any judicial decision. The town had for a long time recognized their validity. The tax payers acquiesced for many years in the meas-

ures taken to raise money by taxation to pay the interest on the bonds. In 1874 and 1875, in their collective capacity in town meetings, they voted upon the question of the sale of the stock held by the town, at elections held under acts of the legislature in these years, which acts, while they did not have the effect of legalizing the bonds which were the consideration for the stock authorized to be sold, nevertheless assumed their validity. The bonds were not illegal or void, in the sense that they were fraudulently issued, or issued without consideration. They were exchanged for stock, and the railroad company, concurrently with the subscription therefor, entered into an agreement with the railroad commissioners that the proceeds of the bonds should be used for the construction and equipment of the railroad within the town of Andes, and this agreement was performed. It is not claimed that there was any fraud or collusion in the bonding proceedings. The bondholders are innocent holders for full value of the securities thus issued. It is very clear, we think, that neither the town nor the tax payers would be permitted to recover back the money actually paid by the town to the bondholders as money illegally paid and received. It was paid upon presumptively valid obligations, under a claim of right on their part to receive it, and, if payments actually made by the officers of the town would be valid and binding, it would not, we think, be an illegal act on the part of the supervisor, under the act of 1881, to apply the money now in his hands according to the direction of the statute, simply for the reason that the validity of the bonds is now questioned. The question of the duty of the officer holding money raised to pay interest on bonds issued under the town bonding acts, to make such payment notwithstanding some omission or defect in the bonding proceedings which rendered the bonds invalid, has been considered by this court in several cases. *People v. Brown*, 55 N. Y. 180; *Bank v. Wheeler*, 72 N. Y. 201. We held in each of these cases that an officer who had in his hands money collected to pay interest on town bonds could not be permitted to question their validity when called upon to pay it over to those entitled to it under the statute. In one case the collector of the town refused to pay the money collected by him to the town commissioners, as required by the act, and in the other the town commissioners, after they had received it, refused to pay it to the

bondholders, and in the case last cited the action of a bondholder to compel such payment was sustained. In both cases the defense was made that the bonds were void, and in both the defense was interposed pursuant to resolutions of the town meeting of the town whose bonds were in question. The money, the payment of which is sought to be restrained in this action, has been collected in usual course from the taxable property of the town of Andes. Neither the town nor the tax payers intervened to prevent its collection. So far as appears, the tax payers paid the money voluntarily, and have no recourse to recover it back. The money does not belong to them, nor, in a strict sense, is it the property of the town. It was raised for a special purpose, and it can be applied legally to no other. The act of 1881 should have a broad and liberal construction to accomplish the purposes of its enactment. But it is difficult to perceive how that can be treated as an illegal act, or as constituting waste, the performance of which may be compelled by *mandamus*. We do not doubt that tax payers may, by means of this statutory action, arrest the payment of money collected to pay fraudulent or collusive claims against a town having neither a legal nor equitable foundation. We confine our judgment to a case of money raised to pay a claim apparently valid, which has been so treated by the town and its tax payers, having implied legislative sanction, and where no fraud is imputed. In such case we think the tax payers cannot arrest the payment under the act of 1881. If in this case judgment was given for a cancellation of the bonds, then it might follow that the fund would be left where it is, as there would be no debt in fact or in form to which it could be applied. See *Metzger v. Railroad Co.*, *supra*. We think the judgment should be affirmed.

All concur.

Municipal bonds — estoppel to deny validity of.—On the effect of laches, acquiescence and conduct as an estoppel or bar to relief in such cases, see *Brown v. Milliken*, 1 Am. R. R. & Corp. Rep. 8, and note; *North v. Platte County*, ante; *Young v. Campbell*, 75 N. Y. 525; *Thatcher v. People*, 98 Ill. 692; *Meyer v. Brown*, 65 Cal. 583; *County of Tipton v. Locomotive Works*, 103 U. S. 523; *Marcy v. Township of Oswego*, 93 U. S. 637; *Commissioners v. Hindeman*, 81 Kans. 729; *Brown v. Atchison*, 89 Kans. 37.

PENNSYLVANIA CO. ET AL. V. ELLETT.

(24 N. E. R. 559; — III. —.)

1. RAILROAD COMPANIES. INJURY AT CROSSINGS. PRACTICE. This was an action against the Pennsylvania Co. and the Union Stock-Yards and Transit Co. for negligently causing the death of the plaintiff's intestate. The accident occurred at the crossing of four tracks which belonged to the latter company, and was caused by a train of the former company which was being backed over the crossing. There was evidence tending to show that no warning was given of the approach of the train, and that no one was on the rear of it to give warning; also, that the deceased was in the exercise of due care. Held, that the court properly refused to take the case from the jury.

2. LIABILITY OF COMPANY OWNING THE TRACKS. The stock-yards company, being vested with the franchise of constructing and operating the railroad, is responsible for any injury resulting from the negligent operation of the road, whether by itself or by those whom it authorizes or permits to use it.

3. In such case the servants and agents of those operating the road will be regarded as the servants and agents of the company owning the road.

4. These rules apply as well to a stock-yards company as a railroad company, where the franchise of constructing and operating the tracks is conferred upon the former company with the right to exercise the power of eminent domain for that purpose.

5. PLEADING. ARREST OF JUDGMENT. To render the owner liable for the negligence of another company using its tracks, it should be averred and proved that such use is by its authority or permission. But an averment that the company whose negligence caused the injury had control and occupation of the tracks will be sufficient after verdict, since the reasonable intendment is, that such control and occupation is by the consent of the owner.

Irus Coy and *R. P. Hollett* for appellant Union Stock-Yards and Transit Company. *Geo. Willard* for appellant Pennsylvania Company. *Willett & Johnson* (*Consider H. Willett*, of counsel) for appellee.

SHOPE, C. J. This was an action of case, to recover damages for negligently causing the death of William R. Walkup, and resulted in a verdict against both defendants for \$4,500, upon which judgment was rendered. On appeal to the appellate court, this judgment was affirmed. Both defendants appeal to this court, and assign errors.

The errors assigned by the Pennsylvania Company relate solely to the sufficiency of the evidence to sustain the action against that company. We are not at liberty to weigh the evidence, and determine the question of fact. However, by its fifth instruction,

which was refused, and which refusal is assigned for error, this appellant asked the trial court to instruct that the evidence was insufficient to warrant a verdict against said company. Upon looking into the record, it is clear there was evidence tending to show that the killing of the deceased resulted from the negligent conduct of the servants of that company in backing its train across Exchange avenue, which the deceased was attempting to cross, and that the deceased was at the time in the exercise of ordinary care for his safety. The casualty occurred immediately in front of the entrance gates of the Union Stock-Yards. At that point the Union Stock-Yards and Transit Company had four railroad tracks, which from five thousand to ten thousand people passed over daily in approaching and leaving the stock-yards. These tracks, running parallel, north and south, are about four feet apart. Near five o'clock of the afternoon of February 14, 1887, the deceased, with a number of other persons, came out of the stock-yards gates, intending to cross these tracks on Exchange avenue, but was stopped by a freight train going north on the third track. Pausing until this train passed, the deceased, who was in the lead, stepped immediately behind the last car on the fourth track, and was instantly struck and killed by the train of the Pennsylvania Company, backing south at the rate of about seven miles an hour. There was abundant evidence, if the jury believed it to be true, from which they might find that no warning whatever was given of the approach of the defendant's train, and that no one was on the rear of the backing train to give warning to persons about to cross the track. There was conflict in the evidence in respect of some of the matters adverted to; but, there being evidence tending to sustain the plaintiff's case, the instruction was properly refused. The fact is, therefore, to be treated as conclusively settled that the Pennsylvania Company was guilty of negligence causing the death of plaintiff's intestate, and that he was in the exercise of due and proper care. As already said, Exchange avenue is used as the ordinary and usual mode of reaching the main entrance to the Union Stock-Yards. This entrance is an arched way, with one large and two small gates, and from thence east, across these tracks, is a planked crossing "about thirty or forty feet in width, which is used in common by persons on foot, and those on horseback, and those in carriages." The deceased was

on this walk or crossing, at which a watchman was kept by the stock-yards company, but who failed to give notice of this backing train. It was for the jury to say whether, in view of all the circumstances shown, the deceased exercised ordinary care for his own safety; and, having found that he did, and that this appellant was negligent, and that finding of fact having been approved on the trial by the appellate court, it is not here open for review.

But it is insisted that, whatever the liability of the Pennsylvania Company may be, the stock-yards company is not liable, and that the court erred in overruling its motion for new trial, and in arrest of judgment. It is said there is no charge in the declaration that this appellant or its servants were guilty of negligence, and, negligence being the gist of this action, no recovery could properly be had without it was alleged and proved. Without pausing to determine whether there are not sufficient allegations of negligence in the declaration to charge the stock-yards company, it will be observed that it is alleged that that company owned and used the four railroad tracks before mentioned, and that the Pennsylvania Company, "having control and occupation of said railroad tracks, and also of a certain locomotive engine attached to a train of cars," negligently managed and operated the same, whereby the plaintiff's intestate was killed, etc. The charge of negligence against the Pennsylvania Company is confessedly ample. The law has become settled in this state, by an unbroken line of decisions, that the grant of a franchise giving the right to build, own and operate a railway carries with it the duty to so use the property, and manage and control the railroad, as to do no unnecessary damage to the person or property of others; and where injury results from the negligence or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable. *Leshner v. Navigation Co.*, 14 Ill. 85; *Railway Co. v. McCarthy*, 20 Ill. 385; *Railway Co. v. Dunbar*, 20 Ill. 623; *Railroad Co. v. Finnigan*, 21 Ill. 646; *Railroad Co. v. Kanouse*, 39 Ill. 272; *Railway Co. v. Rumbold*, 40 Ill. 143; *Railroad Co. v. Lane*, 83 Ill. 448; *Railway Co. v. Campbell*, 86 Ill. 443; *Railroad Co. v. Shacklet*, 105 Ill. 364; *Balsley v. Railroad Co.*, 119 Ill. 68; 8 N. E. Rep'r, 859.

While the company guilty of the negligence — in this case, the Pennsylvania Company — will be liable for the damages resulting therefrom, the owner of the railroad, to whom is granted the control and management of it, will also be liable. The public may look for indemnity for injury resulting from the wrongful or unlawful operation of the road to that corporation to which they have granted the franchise, and thus delegated a portion of the public service ; and for this purpose the company whom it permits to use its tracks, and its servants and employes, will be regarded as the servants and agents of the owner's company. Authorities *supra* ; *Singleton v. Railroad Co.*, 70 Ga. 464 ; *Nelson v. Railroad Co.*, 26 Vt. 717. It follows, therefore, that no other negligence than that of the company or corporation permitted or authorized by the owner company to use its railway need be alleged or proved to fix the liability of the owner.

The law is conceded to be as stated as respects railway corporations in this state, but it is said that the rule can have no application to the stock-yards company. It is insisted that its tracks are upon its private grounds, and for its own convenience, and that the same rule must be applied to its tracks as would apply to the track of a private individual extending into his lumber yards, or the like. Without pausing to discuss what would be the liability in the case supposed, it will be found by reference to the charter of the stock-yards company that its right to own, build, maintain and operate its railway is by virtue of a franchise granted by the state. By its charter (2 Priv. Laws 1865, p. 678) which, it is declared by the legislature, "shall be deemed a public act," appellant is created a body politic and coporate, by the name and style of the "Union Stock-Yards and Transit Company in Chicago," in perpetuity. By the second section, it is given power to locate, construct and maintain upon land it may acquire, in convenient proximity to the southern limits of the city of Chicago, all necessary "yards, inclosures, buildings, structures and railway lines, tracks, switches and turnouts," etc. By the third section, it is authorized to construct a railway, with one or more tracks from its yards, so as to connect, outside of the city of Chicago, its yards with the tracks of all railroad lines entering Chicago from the south and west within prescribed limits. For this purpose, it may acquire land for right of way by purchase and condemnation

(section 4) under the general laws of the state. It is granted power to make connections with all of said railroads, with suitable side tracks, switches and connections, so as to enable "all trains running upon said railroads" so entering said city, to easily and conveniently approach its yards, and to change, alter and relocate its tracks, and to "fully finish and maintain said railroad or roads," and to transport, and to allow to be transported, thereon, by steam or other power, freight and property of every kind, and to fix, establish, take and receive such rates of toll for all freight transported over its lines as its directors may from time to time establish; provided "all fees and charges for freight * * * shall be subject to any general law * * * in reference * * * to railroads." It may construct and maintain its lines of railway across public streets, highways and water-courses. The eleventh section is a limitation upon its power to maintain or operate a railroad for the conveyance of passengers or freight, "in the city of Chicago." It is apparent this appellant, under its franchise, built, owned and operated its railway, clothed with ample power to control its management and operation, whether by itself or other corporations; and every reason of public policy applicable to other railroad corporations applies with equal, if not greater, force to this appellant. It may allow other corporations to use its railway, but it has exclusive control of the manner of its operation, and must be held responsible for its proper management. It may not absolve itself from responsibility to perform its duty by permitting others to discharge its corporate functions.

But it is said that the motion in arrest of judgment should have been sustained because it is not alleged in either count of the declaration that the train of the Pennsylvania Company in question was running upon the stock-yards company's tracks by contract with the latter company, and that for aught that is alleged the former company may have been mere trespassers in so running its train. The allegation is that this appellant was a corporation, organized and acting under the laws of this state, "owning and using railroad tracks upon which the defendant the Pennsylvania Company and other railroads ran their cars and locomotives," etc. And, again, it is averred that the Pennsylvania Company had control and occupation of said tracks. Before verdict the intentions are against the pleader, and, under demurrer to a declara-

tion, nothing will suffice by way of inference or implication; but after verdict the rule, with certain limitations, is entirely different. The rule in respect of the latter case is stated in 2 Tidd Pr. 919, to be: "At common law, when any thing is omitted in the declaration, though it be matter of substance, if it be such as that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment." Mr. Chitty on Pleading (volume 1, page 673) states the rule as follows: "The second mode by which defects in pleading may be, in some cases, aided, is by intendment after verdict. The doctrine upon this subject is founded on the common law, and is independent of any statutory enactments. The general principle upon which it depends appears to be that, where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." In Stephen Pleading it is said (page 148), quoting the court of king's bench in *Jackson v. Pesked*, 1 Maule & S. 234: "Where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict." If the plaintiff omits to state a good title or cause of action, or to state facts from which a good cause of action may be implied, there is no room for indulging in intendments; but on motion in arrest of judgment the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged was proved at the trial; and if, from the issue, the fact omitted, and fairly inferable from the facts stated in the declaration, may fairly be presumed to have been proved, the judgment will not be arrested. Authorities *supra*; *Addington v. Allen*, 11 Wend. 375; *Stantley v. Whipple*, 2 McLean, 35; *Dobson v. Campbell*, 1 Sum. 319. It is clear

that whether the Pennsylvania Company was running its train over this appellant's railway under contract with it, or by its permission and consent, was a matter material to be proved to fix its liability. As before stated, it is alleged that this appellant was a corporation owning and using certain railroad tracks upon which the other defendant and other railroads ran their cars and locomotives, and that said Pennsylvania Company had control and occupation of said tracks. The allegation in this respect is not confined to the particular train from which the injury resulted; but the allegation is general, that this and other railroad companies "ran their cars and locomotives" over these railway tracks owned and used by this appellant. It seems to us that these allegations are "sufficiently general to comprehend" therein, by fair and reasonable intendment, that the Pennsylvania Company was so in control lawfully; that is, by consent of the owner corporation. It may fairly and reasonably be implied that, by some contract or arrangement between the two companies, the other defendant had the right to run its cars and locomotives over these tracks. No other reasonable inference could arise; and, in our judgment, there is sufficient appearing, by fair and reasonable implication from what is alleged, to render the declaration good after verdict. As before said, this matter was directly in issue, and was so far material that no verdict against this appellant could lawfully have been rendered without proof of the fact; and, looking into the bill of exceptions, we find, while there was no express proof of a contract, there is ample evidence from which the jury would be justified in finding that the Pennsylvania Company was running its trains, as it had been for eighteen months prior to the injury complained of, by and with the consent of the owner corporation.

The motions for new trials and in arrest of judgment were properly overruled, and the judgment of the appellate court will be affirmed.

Liability of the owner of a railroad for injuries occasioned by the negligence of its lessee or licensee. — This question is discussed in a note to *Rickerts v. Chesapeake & Ohio R. Co.*, 1 Am. R. R. & Corp. Rep. 455, 461.

EARLYWINE V. TOPEKA, ETC., RY. CO.

(23 Pac. R. 940; 43 Kan. 746.)

1. EMINENT DOMAIN. RIGHTS IN LAND CONDEMNED FOR RAILROAD RIGHT OF WAY.— When the demurrer to a petition is sustained, and the plaintiff elects to stand upon his petition and the facts stated therein, and judgment is rendered against him for costs, no motion for a new trial is necessary to have the question of the sufficiency of the petition reviewed in this court.

2. The title to land appropriated by a railway company under the provisions of article 9, chapter 23, of the Compiled Laws of 1885, remains in the owner of the soil; and the railway company has the right to remove only so much thereof as may be necessary for the construction and repair of its road.

B. A. Seaver, W. D. Webb and J. K. Owens for plaintiff in error. *Waggener, Martin & Orr and W. A. Johnson* for defendants in error.

GREEN, C. Plaintiff below sued the defendants in error, in the district court of Morris county, for trespass alleged to have been committed upon the line of the right of way of the defendants and on the land of the plaintiff. The material allegations of the petition are that the defendants own and operate a line of railroad from Council Grove, in Morris county, to Salina; that said road was built in 1882 through the land of the plaintiff; that on or about the 1st of April, 1886, and at divers times since, along and upon the right of way of said railroad, and on plaintiff's land, the defendants dug up and moved large quantities of dirt and soil, and then and there dug, blasted and quarried large quantities of stone—two thousand perches—of the value of \$1,000, and took and carried the same away and from said land and converted the same to its own use. The claim is made that the defendants are liable for earth and rock taken from the right of way where the defendants have constructed a railroad. A demurrer was interposed to the petition in the court below, which was sustained, and the plaintiff elected to stand on the petition and the facts stated therein; and the court gave judgment for costs against the plaintiff. No motion for a new trial was made.

1. The defendants in error claim that the question of the sufficiency of the petition cannot be reviewed here, because no motion for a new trial was made; that practically there was a trial as upon an agreed statement of facts. We do not think this

position is correct. The record is before this court, and we can pass upon the sufficiency of the petition just as well as though a motion for a new trial had been made, and we do not see the reason or object of a motion for a new trial in this case. But one question was raised by the demurrer. The court decided that question on the petition alone. The plaintiff elected to stand upon his petition, and the facts as therein stated; and the court gave judgment, accordingly, against him. This was a final determination of the case. This court held in the case of Coburn v. Weed, 12 Kans. 182, that an error in a final judgment of the district court was reviewable in this court although no motion to correct the error had been made in that court. Koehler v. Ball, 2 Kans. 160; Lender v. Caldwell, 4 Kans. 290. We think the case is subject to review here.

2. Did the court err in sustaining the demurrer to plaintiff's petition? Whatever rights the defendants below had upon the land of the plaintiff on the right of way were under paragraphs 1390 and 1393 of the General Statutes of 1889, which provides: "Any duly chartered and organized railway corporation may apply to the board of county commissioners of any county through which such corporation proposes to construct its road to lay off along the line of such proposed railroad, as located by such company, a route for such proposed railroad not exceeding one hundred feet in width — except, for the purposes of cuttings and embankments, it shall be necessary to take more, for the proper construction and security of the road — through as much of said county as may be desired by such company; and also such land as may be deemed necessary for side tracks, depots and workshops, and water stations, materials for construction, except timber, a right of way over adjacent lands sufficient to enable such company to construct and repair its roads and stations, and a right to conduct water by aqueducts, and a right of making proper drains. If such company shall cause the copy of the report so certified to be, within ten days after such certifying, filed and recorded in the office of the register of deeds for such county, it shall have the right to occupy the land so embraced within such route for the purposes necessary to the construction and use of its road; and to such portions of such road over which a railroad shall be actually constructed within such time the perpetual

use of such lands shall vest in such company, its successors and assigns, for the use of the railroad, as soon as so much of said railroad shall have been constructed fit for use." It would seem from this authority the railway company acquired such an easement with the right of way as would give it the use of such material as would be necessary to construct and repair its road. This court has said in the case of *Railway Co. v. Allen*, 22 Kans. 285: "An easement merely gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining and operating a railroad thereon. Under this right the company has the free and perfect use of the surface of the land as far as necessary for all its purposes, and the right to use as much above and below the surface as may be needed." The doctrine has been stated by Rorer in his work on *Railroad* (page 325): "Though a railroad company may acquire no interest in the fee of the land itself, the use of which is taken for a right of way for its railroad, yet it acquires, with the right of way or easement, the right to so much of the earth, gravel and stone, trees and timber, within their lines of location, as the company may need for the construction and maintenance of their road, and also to be used in carrying from point to point to supply deficiencies and diminish excesses of each of such material on the road." Now, the petition in this case nowhere alleges that the material the defendants were charged with removing was not necessary in the construction or repair of the road. If it were necessary for the railway company to remove this dirt and stone in the construction or repair of its road-bed, we do not think it would be liable; and, inasmuch as the petition does not allege that it was not necessary, we think it was defective, and the demurrer was properly sustained. It is not necessary for us to decide whether the company would have the right to remove material from one point on its right of way to another, as that question is not properly in this case. The demurrer, we think, was properly sustained; and we, therefore, recommend an affirmance of the judgment of the court below.

PER CURIAM. It is so ordered; all the justices concurring.

RIGHTS OF RAILROAD COMPANY IN THE LAND CONSTITUTING ITS RIGHT OF WAY.

1. The company is an adjoining proprietor and is limited by the maxim *sic utere tuo ut alienum non lædas*.—That a railroad company and those who own the land contiguous to its right of way, are adjoining proprietors, is manifest. In the use of its right of way it is limited by the same obligations to adjacent proprietors, which would attach to it if it was an ordinary proprietor, except that it has an absolute right to operate its road in a reasonable and proper manner, irrespective of injury to such adjacent proprietors. *Lewis Em. Dom.*, § 566. It cannot, in the construction or repair of its road, take away the support of the adjacent soil. *Richardson v. Vermont Central R. Co.*, 25 Vt. 465; *Ludlow v. Hudson River R. Co.*, 6 Lans. 128; *New Orleans, etc., R. Co. v. Brown*, 64 Miss. 479; *Lewis Em. Dom.*, §§ 151, 569; *contra*, *Boothby v. Androscoggin, etc., R. Co.*, 51 Me. 318; *Hortsman v. Covington R. Co.*, 18 B. Monr. 218. Nor may it interfere with the adjacent owner's rights respecting surface-water or running streams, without becoming liable for the damages occasioned thereby. *Wells v. New Haven, etc., Co.*, 1 Am. R. R. & Corp. Rep. 708, and note; *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Gillham v. Madison County R. Co.*, 49 Ill. 484; *T. & W. Ry. Co. v. Morrison*, 71 Ill. 616; *Illinois, etc., R. Co. v. Febringer*, 82 Ill. 129; *Chicago, etc., R. Co. v. Casey*, 90 Ill. 514; *Kankakee, etc., R. Co. v. Horan*, 22 Ill. App. 145; *Chicago, etc., R. Co. v. Glenney*, 113 Ill. 487; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542; *Drake v. Chicago, etc., R. Co.*, 63 Iowa, 302; *Hogenson v. Minneapolis, etc., R. Co.*, 31 Minn. 224; *Payne v. Morgan's, La., etc., R. Co.*, 38 La. Ann. 164; *Gulf, etc., R. Co. v. Helsley*, 63 Tex. 593; *Sabine, etc., R. Co. v. Johnson*, 65 Tex. 389; *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 512; *Owens v. Missouri Pacific Ry. Co.*, 67 Tex. 679; *Raleigh, etc., R. Co. v. Wicher*, 74 N. C. 220; *Shane v. Kansas City, etc., R. Co.*, 71 Mo. 287; *Abbott v. Kansas City, etc., R. Co.*, 83 Mo. 271; *Jones v. St. Louis, etc., R. Co.*, 84 Mo. 151; *Lewis Em. Dom.*, §§ 60-67. A railroad company cannot divert or obstruct a stream on its right of way to the injury of the adjacent owner. *Selma, etc., R. Co. v. Keith*, 53 Ga. 178; *Stodghill v. Chicago, etc., R. Co.*, 43 Iowa, 26; *Union Pacific Ry. Co. v. Dyche*, 31 Kans. 120; *Baltimore, etc., R. Co. v. Magruder*, 34 Md. 79. It cannot use the water of a stream which it crosses for its locomotives beyond the amount which an individual might take as a riparian proprietor, without condemning the private rights thereby affected. *Pennsylvania, etc., R. Co. v. Miller*, 112 Penn. St. 34.

2. Right to trees, herbage, materials, etc., on its right of way.—No question can arise in regard to the right to the timber, materials, etc., on the right of way except where the interest of the railroad company is an easement only. If the company owns the fee no one else can claim any right to that which is above or below the surface. But where it has an easement only it may use the timber and materials for the construction and repair of its road-bed. *Preston v. Dubuque, etc., R. Co.*, 11 Iowa, 15; *Chapin v. Sullivan R. Co.*, 39 N. H. 564; *Taylor v. New York, etc., R. Co.*, 38 N. J. L. 28; *Aldrich v. Drury*, 8 R. I. 554. The company may remove the timber and materials so far as necessary to enable it to properly construct or safely and conveniently operate its road. *Toledo, etc., R. Co. v. Green*, 67 Ill. 199; *Brainard v. Clapp*, 10 Cush. 6. But

the company cannot sell the timber and materials severed from the soil or use them for any other purpose than the construction or repair of its road. *Blake v. Rich*, 84 N. H. 282; *Aldrich v. Drury*, 8 R. I. 554; *Lyon v. Gornley*, 58 Penn. St. 261; *Preston v. Dubuque, etc., R. Co.*, 11 Iowa, 15. But where it is necessary to remove materials, such as timber, stone, coal, etc., which the company does not desire to use on its road-bed, it doubtless might sell the same, or otherwise appropriate them, after giving the owner of the fee notice and reasonable opportunity to remove them. *Clark v. Dasso*, 84 Mich. 86. The owner of the fee has a right to the herbage growing on the right of way, and may remove timber and materials not needed by the company and which can be removed without detriment to the safe and proper operation of the road. *Lake v. Rich*, 84 N. H. 282; *Preston v. Dubuque, etc., R. Co.*, 11 Iowa, 15; *Vermilya v. Chicago, etc., R. Co.*, 66 Iowa, 606; and see *Troy, etc., R. Co. v. Potter*, 42 Vt. 265; *Philadelphia, etc., R. Co. v. Lawrence*, 10 Phila. 604; *Evans v. Haefner*, 29 Mo. 141. But the owner of the fee may not remove the turf, as that would tend to incommode travelers by dust. *Connecticut, etc., R. Co. v. Holton*, 32 Vt. 43.

3. *The company's right of possession.*—There is considerable difference of opinion as to the rights of the owner of the fee to the use of a railroad right of way. Some courts hold as a matter of law that the railroad company is entitled to the exclusive possession of the right of way. *Lake Superior, etc., R. Co. v. Grove*, 17 Minn. 322; *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150; *Connecticut, etc., R. Co. v. Holton*, 32 Vt. 43; *Troy & Boston R. Co. v. Potter*, 42 Vt. 265; *Brainard v. Clapp*, 10 Cush. 6. Other courts hold that the owner of the fee may make such use of the right of way as is not inconsistent with the company's rights, and that it is a question of fact whether any particular use by the owner is consistent with the rights of the company. *Kansas Central R. Co. v. Allen*, 23 Kans. 285; *Kansas City, etc., R. Co. v. Kregelo*, 32 Kans. 608.

MACON, ETC., R. CO. v. STAMPS ET AL.

(11 S. E. R. 442; — Ga. —.)

1. *RAILROAD COMPANIES. POWER OF LEGISLATURE TO CHANGE ROUTE.* A railroad corporation having power by its charter, granted in 1888, to locate and construct its road where it may think proper, may, by amendment to its charter made after the company has located, but before it has constructed, its road, be confined to a particular route, on certain prescribed conditions as to a portion of the line through a given county. This results from the reserved power of the state, declared in sections 1651, 1682, Code, to withdraw the franchises, or change, modify or destroy the corporation, at the will of its creator.

2. *EXERCISE OF POWER NOT PREVENTED BY THE EXISTENCE OF CONSTRUCTION CONTRACTS FOR OLD ROUTE.* The right of the state so to amend the charter is not in any degree abridged or affected by executory contracts between the company and a construction company, and between the latter and sub-contractors, touching the construction and equipment of the road. In so far as

the amendment may render the performance of these contracts impossible, the impossibility will result from act of law, and performance to that extent will be excused. All parties contracting with a corporation must take notice of the conditions on which it holds its franchises, and of its subjection to the legislative will.

3. AMENDING CHARTER. Any allowable modification of the charter of a private corporation may be made by an amendment adding a proviso to one of its sections. The form of the amending act has no influence on its construction or effect.

4. CONSTITUTIONAL LAW. TITLE OF ACT. A substantial, not a literal, conformity of a law to its title is required by the constitution. The title indicating that a railroad is to run into and through a named town, and the body of the act providing for running it into and through the corporate limits, or within one mile of the court-house, on certain conditions, the title covers the matter of the enactment.

5. CONSTRUCTION OF ACT IN QUESTION. The amending act under construction does not contemplate that the town of Thomaston shall or may devote municipal funds to the purpose specified, but that the town as a community, or the citizens, may, if they think proper, contribute voluntarily from their private means, and thereby raise a duty on the part of the railroad company to comply with the act.

6. WHEN SOME OF A CLASS MAY SUE FOR ALL. The citizens of Thomaston have, as a class, a special and particular interest in the matter involved in this cause, and can support an action for the protection of that interest. The class being composed of numerous individuals, some may sue in behalf of all, the interest involved being common to the whole class.

7. QUESTIONS OF PRACTICE. Nothing appears to show that the judge erred in entertaining jurisdiction of the cause. Any objection, founded on the non-residence of the principal defendants in the county, could be waived, and was waived, if these defendants answered without raising and urging that objection.

8. There was no need for enjoining the *mandamus* proceedings, and the injunction granted was, to that extent, improper. Direction is given to modify the injunction accordingly.

9. Under the special circumstances, as a condition of continuing the interlocutory injunction in force after the amount of money necessary to be deposited in bank by the citizens is ascertained, there ought to be bond and security required that the deposit will be made at the proper time. Direction is given that it be so ordered, and that, for any failure to comply with the order, the injunction be dissolved.

Gustin, Guerry & Hall, T. B. Cabaniss and N. J. Hammond for plaintiffs in error. *J. A. Cotton, J. T. Allen, M. H. Sandwich, Lanier & Anderson and Hall & Hammond* for defendants in error.

BLECKLEY, C. J. The Macon and Birmingham Railroad Company was incorporated by an act of the general assembly passed

in December, 1888. Acts 1888, p. 164. The act provided, among other things, "that said company shall have power and authority to survey, lay out and construct, maintain and equip, a railroad from the city of Macon, in the county of Bibb, or from some point on the present line of the Georgia Southern and Florida railroad, through the county of Bibb, and through the following counties, or such of them as said railroad company may deem fit, to-wit, Houston, Crawford, Monroe, Upson, Pike, Meriwether, Troup and Heard, to some point on the state line of Alabama, by the most direct and practicable route, to be judged of by them, and in the direction of the city of Birmingham, Alabama." Part of the statute law of this state in force when this act of incorporation was passed were two sections (1651, 1682) of the Code, as follows: "Persons are either natural or artificial. The latter are the creatures of the law, and, except so far as the law forbids it, subject to be changed, modified or destroyed at the will of their creator; they are called 'corporations.' In all cases of private charters hereafter granted, the state reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter." There is no such negative in the charter of this company. These provisions of the Code have been construed by the supreme court of the United States in *Railroad Co. v. Georgia*, 98 U. S. 359. That court, adjudicating upon a charter granted in 1863, said: "These provisions of the Code became, in substance, a part of the charter. *Railroad Co. v. Maine*, 96 U. S. 499. It is quite too narrow a definition of the word 'franchise,' used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So it was held in *Banking Co. v. Georgia*, 54 Ga. 401, and so it must be held now, especially in view of the statutory provision of the Code that private corporations are subject to be changed, modified or destroyed at the will of their creator." The constitution of 1877 declares that no law making irrevocable grants of special privileges or immunities shall be passed, and that no grant of special privileges or immunities shall be revoked, except in such manner as to work no injus-

tice to the corporators or creditors of the corporation. Code, §§ 5025, 5026. The company proceeded under its charter to locate its line of railroad through Upson county, but, before it constructed any part of the same in that county, the general assembly amended the charter by an act approved November 7, 1889. Acts 1839, p. 336. This amendment provided that, if the railroad runs through Upson county, and within five miles of the town of Thomaston, it shall run into and through the corporate limits of that town, or within one mile of the court-house, provided it shall not cost the company any more from where the road crosses the five-mile limit on the east of the town to the Rogers property than any other route within that limit. The cost is to be determined by two competent disinterested civil engineers, one to be selected by the company, and the other by the mayor of Thomaston, to locate the route proposed by the company within the five-mile limit, and the route within the town, or within one mile of the court-house, on a way which is equitable and just both to the company and the town. These engineers are to estimate the cost of building such line, and, if they fail to agree, they are to appoint a third disinterested competent civil engineer, who shall decide and determine the matter. In estimating the cost of the respective routes, the safety and permanency of the road-beds, and keeping up the same, are to be considered. Whatever amount the estimate shows it will cost more to go through the corporate limits, or within one mile of the court-house, than the route proposed by the company within the five-mile limit, shall be paid by the town of Thomaston or the citizens thereof. Upon refusal to pay the same the company is released from building the road through the corporate limits, or within one mile of the court-house. A sum equal to such extra cost, if any, is to be paid into some solvent national bank of this state when the road is built, from the city of Macon to the five-mile limit, subject to be checked out by the company when the road is built through the five-mile limits. The company refuses to accept this amendment or to comply with its terms. The citizens of Thomaston, or some of them, offer to comply on their part, and insist upon compliance by the company. This difference gives rise to the present controversy.

1. The first question is whether the state, though the legisla-

ture, could ingraft this amendment upon the charter without the consent of the company, inasmuch as the original charter granted power and authority to construct and maintain a railroad through the county of Upson by the most direct and practicable route, to be judged of by the company, with no condition whatever. The amendment certainly withdraws a portion of this broad franchise on certain conditions. As modified by the amendment, the charter still allows the company to select its own route at will through the county, if, in so doing, it should not bring the road within five miles of Thomaston. By bearing away from that town so as not to approach within the five-mile-limit, the company can render this amendment wholly inapplicable to its operations. This being done, the charter will be the same with the amendment as without it. Only by approaching as near to Thomaston as five miles in locating and constructing its line will any affirmative duty whatever devolve upon the company by virtue of the amendment. If such an alteration as this in the charter of a corporation cannot be made, it is difficult to imagine any material alteration that could be made; and, of course, if the reserved power of changing, modifying or destroying will not embrace material alterations the reservation is useless and worthless. No part of the company's line in Upson county being yet constructed, none of the company's property is taken or destroyed by the amendment. A portion of the franchise to locate the line at will is withdrawn, and the amendment takes away nothing else; it simply resumes what the state could have withheld in granting the charter if the legislature had been so disposed. For this reason, if not for others, such cases as *Detroit v. Railroad Co.*, 43 Mich. 140; 5 N. W. Rep'r, 275, are without application to the question before us. The authorities more directly in point are such as *Tomlinson v. Jessup*, 15 Wall. 454; *Miller v. State*, 15 Wall. 478, and *Banking Co. v. Georgia*, *supra*. Where an attempt is made to deprive a corporation of its property by amending its charter doubtless the observations of Cooley, J., in *Detroit v. Railroad Co.*, *supra*, ought to be recognized as sound. He says: "But for the provision in the constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved."

The reservation of the right leaves the state where any sovereignty would be, if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *magna charta*, and in this country always. It is immaterial in what way the property was lawfully acquired — whether by labor in the ordinary avocations of life, by gift or descent or by making profitable use of a franchise granted by the state. It is enough that it has become private property, and it is then protected by the law of the land." No constitutional principles are infringed by exercising a reserved power to revoke special privileges or immunities, unless the provision of our own constitution is violated which forbids doing it in such manner as to work injustice to the corporators or creditors of the corporation. Whether the mode adopted by the legislature in a given instance is just in this respect or not, while primarily a legislative question, may, if palpably decided wrong, become a judicial question. But there is not the slightest indication of injustice in the amendment which we are considering. We see not why the legislature, had it thought proper, could not have passed such an amendment, and made it a part of the charter, by simply enacting that, if the company brought its road within five miles of Thomaston, it should locate and construct its line through the town, wholly irrespective of the comparative cost of two or more routes. To require this to be done, on the further condition that any increased cost should be provided for and paid by others, was giving the company a gratuitous, rather than a necessary, measure of justice. But for the voluntary grant from the legislature, the company would have no right to construct and use, over the lands of the citizens of Upson, any railroad whatever; and permission to do so, attended with an express reservation of a right to revoke or modify the permission, was no pledge to the company that it might build its

road where it pleased, notwithstanding the legislature might please to order otherwise. The charter was as much qualified by the terms of the Code above quoted as if these sections of the Code had been incorporated in the charter itself. For the corporation to complain that the legislature did what it reserved the right to do, and did it before any portion of the line had been constructed in Upson county, seems to us wholly without reason. The company should have been prepared at the beginning, and kept itself prepared, for such a mild and moderate exercise of the state's reserved power.

2. Nor is the right of the state so to amend or modify the charter abridged or in any manner affected by executory contracts entered into by the company with third persons before the amending act was passed. The Macon Construction Company, in dealing with the railroad company, was bound to take notice of the general law of the state, under which the right and power were reserved which have been exercised. A tenant at will cannot make contracts with reference to the estate which will limit the power of the landlord to terminate the estate by means compatible with its legal nature. So a corporation in the possession of franchises held at the will of the state cannot hinder the resumption or modification of those franchises by entering into executory contracts with third persons. Nor can that effect be wrought by like contracts between the parties immediately contracting with the corporation, and sub-contractors under them. On no contract whatsoever does the amendment now in question have any direct effect. Its only effect upon contracts is incidental, and, if they cannot be performed consistently with the alteration in the charter made by the amending statute, their performance, in so far as thus hindered or obstructed, will be excused, the rule of law being that performance of contracts, when rendered impossible by act of law, stands excused. Bish. Cont., § 594; Jones v. Judd, 4 N. Y. 412; Heine v. Meyer, 61 N. Y. 171; Cordes v. Miller, 39 Mich. 581; Knoxville v. Bird, 12 Lea, 121; Railroad Co. v. Green, 9 Heisk. 588; Odlin v. Insurance Co., 2 Wash. C. C. 312; Gray v. Sims, 3 Wash. C. C. 276; Presbyterian Church v. New York, 5 Cow. 538; Baylies v. Fettyplace, 7 Mass. 325; Melville v. De Wolf, 4 El. & Bl. 844; Reid v. Hoskins, 4 El. & Bl. 979; Touteng v. Hubbard, 3 Bos. & P. 291; Baily v. De Crespigny, L.

R., 4 Q. B. 180; *Newby v. Sharpe*, 8 Oh. Div. 39; 2 Co. Litt. . 206a; Com. Dig. "Condition," D (1), D (7), L. (13); Abb. Shipp. 596. Under these authorities, if the Macon Construction Company, or a sub-contractor under it, was under a stipulation to complete the railway by a given time, and if time was of the essence of the contract, a valid excuse for failing so to do would be furnished by this subsequent legislation, if that legislation has rendered or should render it impossible to complete the work by the stipulated time. In so far as this or any other executory contract has been rendered less valuable or profitable to the parties concerned by the legislation in question, that is a consequence which should have been foreseen as possible, and which must be accepted by the parties as an incident of the exercise by the legislature of its rightful legislative power. Surely, it cannot rationally be contended that because the alteration of charters with respect to the latitude of the franchises granted may or does operate unfavorably upon executory contracts made by or under the corporations, the charters must remain unaltered in this respect, and the reserved power in the legislature be reduced to a power in name only.

3. All the provisions introduced by the amending act into the original charter are added to the first section of the charter in the form of a proviso to the same, the initial words of the new matter being, "Provided further." It is contended that because the original charter grants to the corporation the right to locate and construct the road where the company pleases, and this amendment by way of proviso limits or qualifies that right as to a portion of the line, the proviso is repugnant to the purview of the charter, and is, therefore, void; also that, as the whole amendment comes in under the form of a proviso, the whole amendment is void. It is clear, however, that there is no such repugnance in the proviso to the main purpose of the charter as that the two cannot stand together. The amendment operates by way of limitation or restriction upon some of the general terms of the charter, and that such is a proper function of a proviso is laid down by the authorities. *Minis v. U. S.*, 15 Pet. 423; *Potter's Dwar. St.* 118; *Sedg. St. & Const. Law*, 49; *Endl. Interp. St.*, §§ 184, 185; *Institution v. Makin*, 23 Me. 360. For extreme cases in which provisos have been upheld in the charters of corporations, see

Dugan v. Bridge Co., 27 Penn. St. 303; Mason v. Boom Co., 3 Wall., Jr., 252. But here the charter is not rendered inconsistent and destructive of itself by the introduction of this amendment. The matter of the amendment consists of a saving or exception which might have been introduced originally into the charter in the form of a proviso or any other form, and we see no reason why an amending act passed by a subsequent legislature, or at a subsequent session of the same legislature, could not modify or repeal any thing whatsoever in the act amended, and in any form the legislature might choose to adopt. All repealing acts, for instance, might take the form of provisos. Why not? The most that could be said of such repealing acts would be that they were an abuse of the pure and proper proviso, abuses of which are common occurrences in legislation. See section 4 (5), Code Ga. on "Legislative Expressions;" Banking Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. Rep'r, 47. In so far as an act passed by a subsequent legislature, or at a subsequent session of the same legislature, is inconsistent with a prior act on the same subject, a repeal of the prior act is effected; and it seems to us to make no difference that the latter act may, in whole or in part, consist of a proviso. The rule, so far as we know, is universal that, where there is an irreconcilable conflict between two statutes, the latter of the two must prevail, and the former give way.

4. Another charge urged against the amending act is that it is unconstitutional, for the reason that it contains matter different from what is expressed in the title. The title is in these words: "An act to amend an act entitled 'An act to incorporate the Macon and Birmingham Railroad Company,' approved December 26, 1888, so as to require said railroad to run into and through the town of Thomaston, in the county of Upson, and for other purposes." The body of the act requires that, on the conditions mentioned, the railroad shall run into and through the corporate limits of Thomaston, "or within one mile of the court-house." The objection urged is that this alternative requirement is not expressed or indicated in the title. Doubtless the legislature thought that to locate a railroad within a mile of the court-house was, for all substantial purposes, the same as bringing it into and through the town. The corporate limits and the actual limits of the town may not be co-extensive, and, whether they are or not, the

reasonable purpose and object of the act, as indicated in the title, might be accomplished without keeping the body of the act exactly within the letter of its title. The meaning of the constitutional requirement is that the title and the act must correspond, not literally, but substantially; and this correspondence is to be determined in view of the subject-matter to which the legislation relates. We are satisfied that the title of this amending act is reasonably sufficient to cover all the contents of the amendment. The body of the act requires that the railroad shall run into and through the corporate limits of the town, unless, on certain conditions, it shall be located within one mile of the court-house, and outside of the corporate limits. The civil engineers therein provided for must locate it within those limits, or so near thereto as to be within one mile of the court-house. When the title of an act indicates that a thing is to be or may be done, it is no variance from it for the body of the act to provide that the thing shall be done, or not done, on some condition. Here, one of the conditions on which the road is to run into and through the corporate limits of Thomaston is that the engineers, in the exercise of the discretion with which they are intrusted, shall not locate it elsewhere within a mile of the court-house. For the purposes of the act, the town may be considered as extending a mile from the court-house, whether the corporate limits have that extent or not.

5. Another objection urged to the amendment is that it seeks to enable the town of Thomaston, in its corporate capacity to apply corporate money or revenue to the construction of a railroad. We think it has no such purpose, but that where the act says that the increased cost "shall be paid by said town of Thomaston, or the citizens thereof," it means that the town is to act as a community, not as a corporation, and that "town" and "citizen" both mean the people of the town. The payment is to be voluntary, not compulsory. The corporation is not to raise the funds as public revenue, but the people are to contribute the same freely and voluntarily. If they fail to do this, the amendment is to be without any ultimate effect on the location of the road. No tax or tribute whatever is laid, or to be laid, by virtue of this act upon property or persons within the town. Neither the raising nor the expenditure of public money is contemplated. Private means alone are to be used, and if, from that source, the requisite fund is not

raised in due time, the railroad company will be at liberty to proceed as though the amending act had not been passed.

6. We come now to the question whether the citizens of Thomaston can, by petition in the nature of a bill in equity, invoke judicial aid for the purpose of restraining the company from violating this amendment to its charter, and compelling it to cooperate with them in administering the provisions of the amendment. No doubt the general rule is that the state alone will be heard to complain of a corporation for not conforming to the terms of its charter in matters affecting the public interest; or, at all events, that the attorney-general must be a party to the suit, either as plaintiff or defendant. Green's Brice *Ultra Vires*, 595, 602. But here the immediate interest involved, and sought to be protected, is not that of the general public, but the special and peculiar interest of the town of Thomaston. The object of the legislature in preventing the construction of this railroad within five miles of the town, unless it should pass within one mile of the court-house, was to preserve that town from decline and decay in consequence of having a railroad in the vicinity, but not near enough to hinder some rival or competing town from springing up. The general public might or might not have an interest in the measure, but it is certain that the citizens of Thomaston have a vital and peculiar interest therein. The amending act contemplates that that interest shall be respected, and provides means for its protection, upon the assumption that the company will conform to the terms of the act. These terms create a legal obligation on the part of the company, and it seems to us that a corresponding right in the citizens as a community to have that obligation enforced is created by the act. The refusal of the company to perform its legal duties to the citizens of Thomaston is a wrong to them, and the wrong is of such a nature as to admit of no adequate and appropriate remedy, save a proceeding to compel a specific performance by the company of the requirements of the act. As we have already said, the company can relieve itself, and remain free from any duty to the citizens of Thomaston, by not constructing its road within five miles of that town; but it cannot come within five miles with its work, and not comply with the act. To do so would be a violation of its charter, and a special and particular injury to the citizens of the town, who are

no less entitled to the provisions of the amended charter made for their special benefit than the company is to the provisions of the original charter unrepealed, which were made for its benefit. The citizens have as much right to complain of the company for denying them their dues under the charter as the company has, or would have to complain of any citizen for denying it the enjoyment of any of its chartered rights. It is a mistake to suppose that corporations are created alone for their own benefit or that their privileges are more sacred than their duties. We see not why a local and special duty may not be enforced at the instance and by the suit of the local and special body of citizens recognized in the charter as immediately interested in some of its provisions.

7. A further question is whether some of the citizens of Thomaston, suing in behalf of themselves and all their fellow-citizens of the town, will be sufficient as parties plaintiff in this proceeding, or whether all the citizens must join as such plaintiffs. The interest being common to all as a community, and the citizens being numerous (of which fact we can take judicial notice from public statistics), we think the case is provided for by a well-recognized rule, which has long prevailed in equity, and that some, as representatives of the class, may sue for all. Story Eq. Pl., § 94 et seq.; Mitf. Eq. Pl., marg. p. 167 et seq.; 1 Spence Eq. Jur. 656; 1 Daniell Ch. Pr. 234, 237; Pom. Rem., § 388 et seq.; Hawes Parties, 92; 1 Pom. Eq. Jur., §§ 251, 255, 269, 274; Phillips v. Hudson, L. R., 2 Ch. 243; Commissioners, etc., v. Glasse, L. R., 7 Ch. 456; Smith v. Swormstedt, 16 How. 302. It is true that, as only two of the citizens have become parties, it is rather a small representation of the whole community; but, considering the publicity of the case, and of the interest involved in it, and the fact that the suit is located in Upson county, and will be tried (if tried at all) at the county town, which is the town whose citizens are interested, there can be no cause to apprehend that the two plaintiffs on the face of the petition will be disposed, or, if so disposed, allowed to misrepresent the community in whose behalf they have brought this suit. No doubt it is somewhat discretionary with a court of equity as to how many representatives of a class will or ought to be regarded as a fair representation of the whole class in the given instance. We simply rule that this is a proper case for some of the citizens to represent all, and that

the number of representatives, though the smallest that could be recognized, is not, as matter of absolute law, insufficient.

8. One of the errors assigned is that the judge erred in holding that the superior court of Upson county has jurisdiction of the case; but it nowhere affirmatively appears, in the bill of exceptions or the transcript of the record, that any question was raised as to the jurisdiction. From the assignment of error it might be implied that some such question arose and was decided; but we have no information or intimation as to the ground or grounds suggested and insisted upon as objections to the jurisdiction. In the argument here, non-residence in the county of Upson of the two corporation defendants (that is, the railroad company and the construction company) was, we believe, the ground mentioned; but this is a ground which can be waived, and which was waived, inasmuch as these companies appeared and answered without at the same time filing or presenting this objection to the jurisdiction. It is needless to say more on this topic.

9. With respect to the character and scope of the injunction granted, we see nothing to disapprove, except that we think any interference with the *mandamus* proceeding was needless, and, under the circumstances improper. For the protection of the citizens of Thomaston it is quite sufficient that the railroad company be restrained from constructing its proposed line anywhere within five miles of the town without conforming to the amended charter. No amount of preparation, by securing the right of way or otherwise, will violate the charter or harm the town; and, inasmuch as the company must wait for future developments to ascertain that it cannot lawfully construct its line on the location which it has chosen, there is good reason for not interfering with its preparation to use that route, if, by reason of failure on the part of the citizens of Thomaston to perform some of the conditions devolving upon them, the route already chosen should be the one ultimately adopted. It should be borne in mind that any action whatever by the citizens is optional and voluntary. The amended charter seeks to apply compulsion to the company, but none whatever to the citizens. We think the company should be left free to secure the right of way, if it should think proper to do so, along the line of its choice, irrespective of what the citizens may or may not hereafter do. The company may not choose to avail itself of

the privilege while the general controversy remains in an unsettled state; but, whether exercised or not, the privilege should be accorded, as no violation of the charter is or will be involved in it. The duty of the company to yield up the line of its choice, and adopt another, is wholly conditional upon the will and conduct of the people of Thomaston. At least, this will be so, provided the cost of the line by or through the town exceeds the cost of that around the town. It is not always that people continue in a willing mind to raise money and deposit it in bank, or, with ever so good a will, that they can command the means, if the amount to be forthcoming should be very considerable. We think the injunction should be modified so as not to extend to the *mandamus* proceedings, and we direct accordingly.

10. A court of equity, or a court of law in the exercise of equitable functions, may and should always impose just terms as a condition to its interference by interlocutory injunction in behalf of suitors. The granting and continuing of an injunction is not matter of strict right in the parties, but of sound discretion in the judge or the court. In the exercise of such discretion, it seems highly inexpedient to hold one of the parties to the litigation absolutely bound, while the other party remains perfectly free. This would have the appearance of subjecting the former to the will, or even the caprice, of the latter. In view of the fact that the citizens of Thomaston may, after the cost of the two routes is estimated in the manner pointed out by the amended charter, elect ultimately not to advance and deposit the money requisite to defray the excess of cost of the town line over that of the county line, it seems to us reasonable that, upon this excess (if any) being ascertained, the plaintiffs in this petition should be required, as a condition of the continuance of the injunction after that time, to give bond and security to insure a deposit of the money, according to the amended charter, as soon as the railroad shall be built to the five-mile limit. This bond should be in double the amount of the excess of cost ascertained by the estimate of the engineers, and should be payable to the railroad company, with a condition to deposit in bank, conformably to the amended charter, a sum equivalent to such excess; or, on failure so to do, to answer to the company for all damages which it may sustain by reason of this injunction having been granted and continued in force. We direct

that the judge of the Flint circuit, or some other judge, should be disqualified, pass an order requiring such bond and security to be given, and that, upon failure to comply with its terms, the injunction be dissolved.

Judgment affirmed, with direction.

CITY OF DULUTH V. MALLET.

(45 N. W. R. 154; 43 Minn. 204.)

1. MUNICIPAL CORPORATIONS. OBSTRUCTING STREETS BY RAILROAD CARS. The legislative charter of a city, authorizing the adoption of ordinances to prevent the incumbering of streets with carriages, held to authorize an ordinance to prevent the obstruction of streets by railroad cars.

2. An ordinance prohibiting the stopping of railroad cars or locomotives on a street crossing for the switching of cars is not *prima facie* unreasonable and void.

3. LIABILITY OF AGENT FOR VIOLATING ORDINANCE. It does not exculpate one violating the law that he was an agent acting under the direction of another.

White & Reynolds for appellant. *S. L. Smith* for respondent.

DICKINSON, J. This is a prosecution for the violation of an ordinance of the city of Duluth which prohibited the stopping of a train of railroad cars or a locomotive on any street crossing, either for switching or any other purpose whatever, except to prevent accident in case of immediate danger. The defendant was convicted, the case showing that he was the engineer operating a locomotive attached to a long train of freight-cars; that he stopped the train on a street crossing (Lake avenue), and ran back and forth on the crossing several times for the purpose of switching cars and placing them in position, some part of the train being all the time on the crossing — the street being thus continuously obstructed for a period of from six to ten minutes, according to the testimony on the part of the prosecution; that the train was at a stand-still only long enough to reverse the direction of its motion.

The charter of the city authorizing the adoption of ordinances "to prevent the incumbering of streets * * * with carriages, carts, wagons, sleighs, boxes, fire-wood or any other material or

substance whatever," empowered the city council to pass a reasonable ordinance to prevent such obstructions by railroad cars. They are "carriages," within the meaning of the statute.

If under any circumstances the ordinance could be deemed unreasonable, there was nothing shown in this case to justify the court in so declaring. It is not apparent from the ordinance itself that it was so; and courts are not justified in declaring such enactments unreasonable. and, therefore, invalid, unless their unreasonableness be clearly shown. *Knobloch v. Railway Co.*, 31 Minn. 402; 18 N. W. Rep'r, 106. No necessity was shown for the use of this street crossing for the purpose of switching cars. It does not follow that the prohibition of the ordinance was unreasonable merely because it may have interfered with a use of the street crossing, which was a matter of convenience to the railroad company, nor merely because the switching could not be practicably done at this place in any other manner than that adopted on this occasion.

It did not excuse the engineer of this train that he acted under the direction of a foreman or superior agent of the corporation.

Order affirmed.

Obstructing a highway with railroad cars is an indictable offense.— *Commonwealth v. Nashua, etc.*, R. Co., 2 Gray, 54; *Cambridge v. Charlestown R. Co.*, 7 Metc. 70; *Louisville, etc.*, R. Co. v. State, 8 Head, 523.

CITY OF SANDWICH V. DOLAN.

(24 N. E. R. 526; — Ill. —.)

1. MUNICIPAL CORPORATIONS. DEFECTIVE SIDEWALK. CONTRIBUTORY NEGLIGENCE. INSTRUCTIONS. The plaintiff was injured by reason of a defective sidewalk which had been long out of repair to the knowledge of the plaintiff. Held, that whether she was in the exercise of due care in using it at the time was a question of fact for the jury upon all the evidence, and an instruction, that, if the walk formed the most direct route to her destination, she was not obliged to take a less convenient one because the walk was defective, was erroneous.

Carnes & Dunton for appellant. *John L. Pratt* and *Samuel Alschuler*, for appellee.

CRAIG, J. This was an action brought by Belle F. Dolan against the city of Sandwich to recover for an injury received from a fall on a defective sidewalk on the night of December 25, 1887. The plaintiff resided on the south side on Third street, and the accident occurred about nine o'clock in the evening, as plaintiff was going from the Congregational church to her residence. The sidewalk over which the plaintiff was passing was the direct route from the church to her residence, and where the accident occurred, in front of what is known as the "Kinney lot," it had been out of repair, and in an unsafe and dangerous condition, for several months. The plaintiff had been in the habit of passing over the defective walk for some months before the accident, as she testified, from four to six times a week, and the dangerous condition of the walk was known to her at the time. On the trial one witness, who resided on the same side of the street where plaintiff resided, testified, in his cross-examination, substantially as follows: "I had avoided this walk during the fall and summer before Christmas. My reason was that there was danger from loose boards flying up. It is the nearest way for us to go to church for evening services, when we pass into the lecture-room, but in the morning I usually went on the other side of the street." Doubtless, for the purpose of removing from the mind of the jury the impression which might be created by this evidence, that any legal duty rested upon the plaintiff of taking some other route to the church which might be safer or less dangerous, or for the purpose of removing from their mind the fact that plaintiff did not exercise ordinary care, counsel for plaintiff prepared, and the court gave to the jury, the following instruction: "(10) If the jury believe from the evidence that the most direct route for the plaintiff in going to and from the Congregational church, in the city of Sandwich, to her home, in said city, was over the sidewalk along the south side of Third street, in said city, then the fact, if shown by the evidence, that such sidewalk on said street over which plaintiff passed was defective, and had been in a defective condition for some months previous to the alleged injury, would not oblige her to take another less convenient sidewalk." The giving of this instruction is relied upon as error. The court in instruction No. 8 directed the jury that the question of whether or not the plaintiff was exercising or-

dinary care to avoid injury, in passing over the sidewalk when and where the alleged injury took place, is a question of fact, to be determined by the jury from all the evidence. This charge to the jury was clearly correct. The plaintiff could not recover, however negligent the defendant may have been in failing to keep its sidewalks in proper repair, unless the plaintiff at the time of the accident was exercising ordinary care to avoid injury, and whether plaintiff was in the exercise of ordinary care, as has been often held, is a question of fact. Had the question of what degree of care was required of plaintiff been left where this instruction placed the question, no fault could be found with the instructions; but it is denied that No. 10 invades the province of the jury, and in substance directs them that the plaintiff might expose herself to known danger with impunity, provided she was traveling in the most direct route to her home. As has been said before, it was a question for the jury to determine whether the plaintiff at the time she received the injury was in the exercise of proper care. If there were two routes from plaintiff's residence to the church, one dangerous and the other entirely safe, and in the selection of a route plaintiff saw proper to pass over the dangerous one, it could not be determined, as a matter of law, that plaintiff was justified in selecting the dangerous route, but the question ought to have been left to the jury. As an abstract question, it may be that plaintiff was not obliged, as declared in the instruction, to take another less convenient sidewalk, but, if she failed to do so, it would be a question of fact whether, in the selection of a route known to be dangerous, she was in the exercise of ordinary care.

When this court had the power to review questions of fact as well as questions of law, in *City of Centralia v. Krouse*, 64 Ill. 21, where a sidewalk had been damaged by fire and become dangerous to travel upon, it was held to be the duty of the public to pass on the other side of the street; and where a person was injured in passing over the dangerous walk, knowing its condition, it was held he could not recover. In *Lovenguth v. City of Bloomington*, 71 Ill. 238, following the rule announced in the case last cited, it was held that an instruction to the effect that the plaintiff was not bound to travel on another sidewalk than the one on which he received the injury complained of, even though he

knew that the one on which he was injured was out of repair, was properly refused. It is there said: "Had the court given this instruction as it was prepared, it would have been, in effect, telling the jury the plaintiff's son might properly pass over the sidewalk, however dangerous it might be, with full knowledge on his part of its dangerous character. This is not the law." See, also, *Braker v. Town of Covington*, 69 Ind. 33; *Railroad Co. v. Taylor*, 104 Penn. St. 306; *Wilson v. City of Charlestown*, 8 Allen, 137; *Dill. Mun. Corp.* (3d ed.), § 1007, where the same doctrine is announced. In the case last cited, it is said: "The fact that the street in front of the sidewalk and the sidewalk on the opposite side of this street were in such condition that they could have been used safely and conveniently, which was shown, tended to prove a want of care on the part of the female plaintiff. It is settled that, if a person knows a way to be dangerous when he enters upon it, he cannot, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain damage, look to the town for indemnity. *Horton v. Ipswich*, 12 Cush. 488. In section 1007, *Dill. Mun. Corp.*, it is said that the party injured must be free from contributory negligence, *i. e.*, if he knew of the defect or obstruction, and ought reasonably to have avoided it by going outside or around it, and did not, he cannot recover. Whether it was obligatory on plaintiff to travel over one walk or the other was a question which it was not the province of the court to determine as a matter of law, and we think the instruction was calculated to mislead the jury. *City of Aurora v. Hillman*, 90 Ill. 61, has been cited as sustaining the instruction. It is true that an instruction like the one in question was sustained in that case; but there the party injured was not aware of the dangerous condition of the walk. Had the walk been known to be dangerous, as was the case here, doubtless a different rule would have been announced in regard to the instruction. This is manifest from what is there said (as follows): "In *City of Centralia v. Krouse*, 64 Ill. 20, the sidewalk was positively dangerous, and practically impassable, and Krouse had full knowledge of this, and it was culpable negligence in him to undertake to pass over it. The sidewalk in this case was not of this character, and, although out of repair, had been passed over daily, not only by appellee, but by all other pedestrians who found it con-

venient so to do. * * * The evidence does not show appellee, who was a shoemaker, knew the stringers were rotten, and would not hold nails, and he testified on the trial he did not know the plank Moreau stepped on was loose, and that he had passed there that morning, and it was not loose then." *City of Bloomington v. Chamberlain*, 104 Ill. 268, has also been cited by the plaintiff; but there is nothing in that case to sustain the instruction involved here. It was there held that knowledge of the condition of the walk is one of the circumstances to be considered in determining whether the plaintiff exercised ordinary care. It was also held that it cannot be laid down as a legal proposition that a person traveling on the sidewalk of a city is bound to go out into the street and pass around the walk, although he knows it to be defective, especially when the defect is merely loose boards, and the walk is not palpably dangerous. We think the instruction calculated to mislead the jury, and thus erroneous. The judgment of the appellate and circuit courts will be reversed and the cause will be remanded to the circuit court.

Contributory negligence — knowledge of defect causing the injury.—As a general rule, where a person is injured by reason of a defective highway, his previous knowledge of the defect will not necessarily preclude a recovery, but the question of contributory negligence will be for the determination of the jury in view of all the circumstances of the case. *St. Louis, etc., R. Co. v. Box*, 1 Am. R. R. & Corp. Rep. 226; *City of Ft. Wayne v. Breese*, ante; *Seeley v. Southern Pacific R. Co.*, ante; *Smith v. Lowell*, 6 Allen, 39; *Reed v. Northfield*, 13 Pick. 94; *Gilman v. Deerfield*, 13 Gray, 577; *Whittaker v. West Boylston*, 97 Mass. 273; *Lyman v. Amherst*, 107 Mass. 339; *Pollard v. Woburn*, 104 Mass. 84; *George v. Haverhill*, 110 Mass. 506; *Whitford v. Southbridge*, 119 Mass. 564; *Lyman v. Hampshire*, 140 Mass. 311; *Aurora v. Hillman*, 90 Ill. 61; *Aurora v. Dale*, 90 Ill. 46; *Hanlon v. Keokuk*, 7 Iowa, 488; *Rice v. Des Moines*, 40 Iowa, 638; *Turnpike Co. v. Jackson*, 86 Ind. 111; *Wilson v. Trafalgar, etc., Road*, 93 Ind. 287; *Montgomery v. Wright*, 72 Ala. 411; *Dooley v. Meriden*, 44 Conn. 417; *Fox v. Glastenbury*, 29 Conn. 204; *Bullock v. New York*, 99 N. Y. 634; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Niven v. Rochester*, 76 N. Y. 619; *Smith v. St. Joseph*, 45 Mo. 449; *Wheeler v. Westport*, 30 Wis. 392; *Kelly v. Fond du Lac*, 31 Wis. 179; *Kenworthy v. Ironton*, 41 Wis. 647; *Hubbard v. Concord*, 35 N. H. 52; *Humphreys v. Armstrong*, 56 Penn. St. 204; *Folsom v. Underhill*, 36 Vt. 580; *Coates v. Canaan*, 51 Vt. 131; *Erd v. St. Paul*, 22 Minn. 443; *Baltimore v. Holmes*, 39 Md. 243.

COLLINS V. TOLEDO, ETC., RAILROAD Co.

(45 N.W. R. 178; 80 Mich. 390.)

1. RAILROAD COMPANIES. DEPOT PLATFORM. NEGLIGENCE. At a country station of defendant, the platform was from fifteen to thirty inches from the ground. There were no steps. A plank had been placed from the ground to the platform, leading to which was a well-defined path, and persons had been accustomed to use this plank in coming to or leaving the depot. As the plaintiff was going to the depot the plank slipped and fell and she was injured. It was held that the defendant was bound to provide a safe means of reaching the station, and, if it permitted an unsafe means to be used for that purpose, it was liable to the same extent as though it had provided that means itself.

2. EVIDENCE. It was competent to show how long and to what extent the plank had been used. A judgment for the plaintiff was affirmed.

Lyon & Hackleman for appellant. *Watson & Chapman* for respondent.

CAHILL, J. This action was brought to recover damages on account of an injury to plaintiff's foot occasioned by the falling of a plank on which she was walking in ascending the platform at defendant's depot at Carland. The plaintiff recovered \$1,000, and the defendant brings error. Carland is a station in the country at a crossing of an ordinary country road, without sidewalks. There are two stores on the opposite side of the highway, and a little south. At the time of the accident, Mr. Shannon, one of the store-keepers, acted as agent. The station and platform had been built for about three years prior to the accident, which occurred on the 21st day of August, 1888. The station-house was surrounded by a platform elevated in most places about two feet from the ground. From the platform, which surrounded the depot, there extended west, along the railway track, another platform, about forty feet long and twelve feet wide, which was used by passengers entering and leaving the cars. At the west end of this platform, it was not so high above the ground; but at one point, at least, near the north-west corner, the ground was only about fifteen and one-half to sixteen inches lower than the top of the platform. The railroad company had never provided any steps to this platform at any point, and persons having occasion to visit the station were required to step from the ground, a distance of twenty to thirty inches, varying with

the level of the ground at different places, except that if they entered it at the west end, they could reach it by stepping between fifteen and sixteen inches. The west end of the platform, however, was little used. Most of the people who went to the station would go there from the stores; and, in reaching the station from the stores, it was a shorter and more direct route to pass to the south of the platform extending west, and reach the platform at a point close to the station. There was a well-beaten path from the store of Mr. Shannon, the agent, running easterly towards the station to the edge of the platform which ran north and south close by the station. There was a plank about twelve inches wide and fourteen feet long at the point where the beaten path reached the platform, which was commonly used by persons ascending the platform at that point, and had been ever since the depot was built. On the day of the accident the plaintiff, with her husband, had gone to the station to receive the body of a granddaughter who was expected to arrive on a train. Several of their neighbors were gathered with them at the store of Mr. Shannon, awaiting the arrival of the train. When they started to go to the station the entire party followed the beaten path which led from the store to the point where the plank was. All of the party, consisting of four or five persons, ascended the plank in safety; but, while the plaintiff was on it, it slipped and fell to the ground, carrying the plaintiff with it, severely injuring her foot, and, as she claims, permanently disabling her. The declaration charges that it was the duty of the defendant to keep the depot and grounds in good repair for the protection and safety of its patrons, and to provide suitable steps to reach the platform connected with the depot; and it is alleged that the defendant negligently failed to build, erect or maintain any approaches to said platform and depot, whereby the same became and was very dangerous to those coming upon defendant's grounds on business with defendant. "And said plaintiff avers that the only means provided for her to reach said platform was by means of a plank laid upon said platform, one end resting thereon, and the other end resting on the ground, which said defendant had provided for and allowed its patrons to use in getting upon its said platform, and into its said depot; that said plank had been so used by the patrons of said defendant for a long space of time prior to said

21st day of August, 1888, with the knowledge and consent of said defendant; that said defendant carelessly and negligently left said plank, and permitted and allowed it to be used by its patrons, and those who came to its depot and platform on business with said defendant, and carelessly and negligently failed to fasten the same securely to said platform, so that the same would not fall and injure those who were using it in course of business with said corporation, whereby it became and was very dangerous to those using the same to reach said depot and platform."

The case against the defendant, plainly stated, is this: It was its duty to provide a reasonably safe and convenient means whereby persons having business at the station could reach it. The platform about the station was so high as not to be conveniently reached, particularly by women, without a step. The defendant provided no step. As a result, some one else, no matter who, provided a way — a temporary expedient — for getting over the difficulty. This temporary expedient was adopted by the public. It grew into a common way. The station agent used it. Everybody used it. There was a well-beaten path leading to it. If a person approaching the station looked along the platform, for a step upon which to ascend it, and saw none, there was the plank, with the beaten path, inviting him. Although the platform at the west end was lower, it was not enough lower to attract attention to it as the place especially intended or designated for people to enter it. When the plaintiff attempted to use the plank on the day of the accident, she did so only after her companions had preceded her in safety. It may have appeared safe. The declaration alleges that its insecurity lay in the fact that it was not fastened. The plaintiff testified: "Just as I got almost ready to step my foot on the platform, this plank slipped back and went down; and I went with it, of course."

The court charged the jury: "(3) If the defendant habitually received and let off their passengers at such place by way of a plank, they must be expected to use such care as the circumstances called for; and if they did not use such care they would be guilty of negligence; and, if the plaintiff was injured thereby without any fault or negligence on her part, or want of due care on her part, she would be entitled to recover." "(5) If the jury find that the company did not provide the plank in question for

the purpose of its being used by people going to and from the depot, but it was procured and used for the purpose and in the way stated by Mr. Shannon, the agent, then the company is not liable for the use of it by the plaintiff in the manner she did, on account of which she got hurt, unless you find that the company knew that said plank had for a long and continuous time been used by people doing business with said company, for the purpose of ingress and egress to and from the passenger depot of said company." We think the court was justified by the evidence in these instructions. The duty of the railroad company to provide a safe means of reaching the station is clear. If, with full knowledge of the facts, it permitted an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as if it had itself set up and maintained the dangerous way. *Cross v. Railway Co.*, 69 Mich. 363; 37 N. W. Rep'r, 361; *Beard v. Railroad Co.*, 48 Vt. 101; *Railroad Co. v. Trautwein*, 19 Atl. Rep'r, 178; *Keefe v. Railroad Co.*, 7 N. E. Rep'r, 874.

Error is assigned upon the admission of evidence tending to show how long the plank had been in use, and how much it had been used by the public. We think such testimony was competent to show the extent to which the way had been used. The judgment will be affirmed, with costs.

The other justices concurred.

Duty of railroad companies as to station and its approaches.—It is the duty of a railroad company to keep its stations, and the platforms and approaches appurtenant thereto, in a safe condition for passengers and others entitled to use the same, and the company will be liable for injuries resulting from a breach of this duty. *Chicago, etc., R. Co. v. Fillmore*, 57 Ill. 265; *C. & I. C. R. Co. v. Farrell*, 81 Ind. 408; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa, 124; *Tobin v. P. S. & P. R. Co.*, 59 Me. 183; *Quimby v. Boston, etc., R. Co.*, 69 Me. 340; *McKane v. Michigan Cent. R. Co.*, 51 Mich. 601; *Buenemann v. St. Paul, etc., R. Co.*, 32 Minn. 390; *Forsyth v. Boston, etc., R. Co.*, 103 Mass. 510; *Hubbard v. New York Central, etc., R. Co.*, 40 N. Y. 145; *Hoffman v. New York Central, etc. R. Co.*, 75 N. Y. 605; *Dillage v. New York Central, etc., R. Co.*, 56 Barb. 30; *Gillis v. Pennsylvania R. Co.*, 59 Penn. St. 129; *Stewart v. International, etc., R. Co.*, 53 Tex. 289; *Patten v. Chicago, etc., R. Co.*, 32 Wis. 524; *Hartwig v. Chicago, etc., Ry. Co.*, 49 Wis. 358; *Bennett v. Railroad Co.*, 103 U. S. 577; *Beard v. Connecticut, etc., R. Co.*, 48 Vt. 101; *Burgess v. Great Western Ry. Co.*, 6 C. B. (N. S.) 923; *Longman v. Great Western Ry. Co.*, 19 C. B. (N. S.) 183.

GEISS V. FRANKLIN INS. CO.

(24 N. E. R. 90; 123 Ind. 173)

1. **INSURANCE. CONDITION AS TO TITLE.** The defendant for a gross sum insured the plaintiff in the sum of \$1,000, distributed in specific amounts upon six different articles or classes of personal property, all contained in the same building and subject to the same risk. One of the articles was a soda fountain insured for \$350. The policy provided that if the assured was not the sole, absolute and unconditional owner of the property, the policy should be void. The assured had purchased the soda fountain and given his notes for the price, and the notes provided that the title to the fountain should remain in the seller until the notes were all paid. The insured was ignorant of the effect of the notes on his title. Held, that the condition was violated and the policy void as to the fountain.

2. **CONDITION, WHETHER DIVISIBLE.** It was held further that as the consideration paid was a gross sum and all the property insured was subject to the same risk, the contract was entire and, being void as to part, was void as to all the property insured.

3. **PRACTICE.** After a new trial has been granted it is too late to object that the motion therefor was not reasonably made.

Fred. P. Leonard for appellant. *A. L. Roach* and *G. V. Menzies* for appellee.

MITCHELL, C. J. Geiss sued the Franklin Insurance Company to recover the amount of loss alleged to have resulted to him from the destruction of certain personal property, which had been insured against loss by fire under a policy issued to the plaintiff by the above-named insurance company. By the terms of the policy the company stipulated, for a gross sum, to insure separate and distinct articles and kinds of property, all contained in the same building, for certain specific and distinct sums, the whole aggregating \$1,000. One of the articles covered by the policy was a soda fountain, which was insured separately for the sum of \$350. Smaller sums were distributed over the classes of property. The policy contained a stipulation to the effect that, in case the assured was not the sole, absolute and unconditional owner of the property insured, the policy should be void. Before taking out the policy, the assured had purchased the soda fountain therein mentioned, and the appurtenances thereto, from a manufacturer in Boston, and had given his notes for the purchase-price, in each of which it was stipulated, in effect, that the title to the property

should be and remain in the seller until the notes for the purchase-price were all fully paid. The notes had all fallen due, and about half of them had been paid, when the fire occurred which destroyed the soda fountain, as well as all the other property covered by the policy. The foregoing facts having appeared in evidence, together with the further fact that the assured was not aware of the legal effect of the stipulation contained in the notes, so far as it affected the ownership of the property, until he had taken professional advice after the fire, the court instructed the jury to return a verdict for the defendant. It is conceded that the assured was not the sole, absolute and unconditional owner of the soda fountain and apparatus connected therewith. It follows, as a matter of course, as applied to that item of property, the policy was void. *Carpenter v. Insurance Co.*, 4 N. Y. Supp. 925. The question is, can it be upheld as respects the other separate and distinct classes of property? In *Havens v. Insurance Co.*, 111 Ind. 90; 12 N. E. Rep'r, 137, the conclusion was reached that where property covered by a policy of insurance, although consisting of separate items, constitutes substantially one risk, and is necessarily subject to destruction by the same conflagration, then, even though separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire, and any breach of a stipulation which renders the policy void as to a part affects the other items in the same manner. See, also, *Insurance Co. v. Pickel*, 119 Ind. 155; 21 N. E. Rep'r, 546; *Pickel v. Insurance Co.*, 119 Ind. 291; 21 N. E. Rep'r, 898.

The aggregate amount of the policy in the present case was \$1,000. This was apportioned in different amounts over six distinct and separate items or classes of property, more than one-third of the whole amount being upon the soda fountain, to which the assured had only a conditional right. It was all exposed to one risk, and the consideration for the policy was a specified sum. The court cannot say that the insurance company would have insured the soda fountain if the true state of the title thereto had been disclosed, nor can we say that it would have insured the other items or classes of property without insuring the soda fountain. The contract was entire and indivisible, and to hold

the company liable would be to enforce upon it an obligation which it never entered into. This would be to make an agreement for the parties, rather than to enforce the liability of one of them upon an agreement made by the parties themselves. We fully appreciate the unfortunate situation of the assured, but courts of law cannot be made asylums in which every person who has made a mistake can take refuge against his own contract, deliberately entered into. Where the validity of the insurance is made to depend upon the assured being the absolute and unconditional owner of the true title of the property insured, a failure to set forth the title with substantial accuracy renders the policy void, not only as to the property the title to which is not truly represented, but to all other property covered by the same policy, and subject to the same risk. This is so, even though the owner had no intention to deceive. *Wilbur v. Insurance Co.*, 10 Cush. 446; *May Ins.*, § 287. This rule has no application, however, in case it appears that the agent of the insurance company who consummated the contract and issued the policy was informed or knew of the true state of the title or ownership of the property. *Insurance Co. v. Barnes* (Kans.), 21 Pac. Rep'r, 165; *Insurance Co. v. Camp* (Tex.), 9 S. W. Rep'r, 473.

There had been a former trial of this cause, and a general verdict for the plaintiff. The defendant thereupon moved the court for judgment notwithstanding the general verdict. This was overruled. Afterward the court granted a new trial on the defendant's motion. The appellant now insists that the motion for a new trial came too late; that the right to move for a new trial was waived by moving for judgment notwithstanding the general verdict. The argument is that this latter motion was, in effect, a motion in arrest of judgment. We are not required to determine the effect of the first motion upon the right of the defendant to move for a new trial, inasmuch as there does not appear to have been any objection at the time, to the motion for a new trial. Where a motion for a new trial has been made and entertained by the court, it is too late, after a new trial has been granted, to object that the motion was not seasonably made. *Sweetser v. McCrea*, 97 Ind. 404; *Northcutt v. Buckles*, 60 Ind. 577; *Wilson v. Vance*, 55 Ind. 394; *Hill v. Hazen*, 93 Ind. 109;

Trentman v. Swartzell, 85 Ind. 443; Bronze Co. v. Clark, 23 N. E. Rep'r, 855 (present term).

The judgment is affirmed, with costs.

Divisibility of insurance contracts.—Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164; Barnes v. Union, etc., Ins. Co., 51 Me. 110; Lovejoy v. Augusta Mut. Fire Ins. Co., 45 Me. 472; Gould v. York, etc., Ins. Co., 47 Me. 402; Bowman v. Franklin Ins. Co., 40 Md. 620; Aetna Ins. Co. v. Resh, 44 Mich. 55; Plath v. Minnesota, etc., Ins. Co., 23 Minn. 479; Treadway v. Hamilton Ins. Co., 29 Conn. 68; Kountz v. Hamilton Ins. Co., 42 Mo. 126; Gottsman v. Pennsylvania Ins. Co., 56 Penn. St. 419; Draper v. Charter Oak Ins. Co., 2 Allen, 569; Clark v. N. E. Mut. Fire Ins. Co., 6 Cush. 842; Baldwin v. Hartford Fire Ins. Co., 60 N. H. 422; McGowan v. Peoples' Mut. Fire Ins. Co., 54 Vt. 211; Merrill v. Agricultural Ins. Co., 73 N. Y. 452; Moore v. Virginia, etc., Ins. Co., 28 Gratt. 508; Hinman v. Hartford Fire Ins. Co., 36 Wis. 159; Quarrier v. Peabody Ins. Co., 10 W. Va. 507.

CHICAGO, ETC., RY. CO. V. MINNESOTA.

(10 Sup. Ct. R. 462; 134 U. S. 418.)

1. **CONSTITUTIONAL LAW. CHARTER AS A CONTRACT. LIMITING RATES.** A provision in a railroad charter, that the corporation should have power to make all needful rules, regulations and by-laws touching the rates of toll and the manner of collecting the same, does not preclude future legislatures from reasonably limiting the amount of its charges.

2. **EXEMPTION FROM FUTURE GENERAL LEGISLATION MUST BE GIVEN IN EXPRESS TERMS.**—The right of a state to impose reasonable limitations upon the charges of railroad corporations cannot be held to have been granted away, unless by express words to that effect or their equivalent.

3. **THE QUESTION OF REASONABLE RATES A JUDICIAL ONE.** An act of a state legislature which makes the decision of a railroad commission final and conclusive as to what are equal and reasonable rates to be charged by a railroad company, without any provision for a hearing before said commission or any judicial investigation, is unconstitutional and void as depriving such company of its property without due process of law and denying it the equal protection of the law.

4. **WHAT IS DEPRIVING OF PROPERTY.** To deprive a railroad company of the right to charge reasonable rates for the use of its property, deprives it of the lawful use of its property and so in substance and effect of the property itself.

John W. Cary and *W. C. Goudy* for plaintiff in error. *Moses E. Clapp* for defendant in error.

BLATCHFORD, J. This is a writ of error to review a judgment

of the supreme court of the state of Minnesota, awarding a writ of *mandamus* against the Chicago, Milwaukee and St. Paul Railway Company. The case arose on proceedings taken by the railroad and warehouse commission of the state of Minnesota, under an act of the legislature of that state approved March 7, 1887 (General Laws 1887, chap. 10), entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers." This act is set forth in full in the margin.* The ninth section of that act creates a commission, to be known as the "railroad and warehouse commission of the state of Minnesota," to consist of three persons, to be appointed by the governor by and with the advice and consent of the senate. The first section of the act declares that its provisions shall apply to any common carrier "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the state of Minnesota." The second section declares "that all charges made by any common carrier subject to the provisions of this act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith or for the receiving, delivering, storage or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited, and declared to be unlawful." The eighth section provides that every common carrier subject to the provisions of the act shall print and keep for public inspection schedules of the charges which it has established for the transportation of property; that it shall make no change therein except after ten days' public notice, plainly stating the changes proposed to be made, and the time when they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that so established and published for transporting property; that it shall file copies of its schedules with the commission, and shall notify such commission of all changes proposed to be made; that, in case the commission

*The act is omitted as sufficient is stated in the opinion to render the case intelligible.

shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable," to which end the commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that, in case the carrier shall neglect for ten days after such notice to adopt such tariff of charges as the commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the commission; and that, if any carrier subject to the provisions of the act shall neglect to publish or file its schedules of charges, or to carry out such recommendation made and published by the commission, it shall be subject to a writ of *mandamus* "to be issued by any judge of the supreme court or of any of the district courts" of the state, on application of the commission, to compel compliance with the requirements of section 8, and with the recommendation of the commission, and a failure to comply with the requirements of the *mandamus* shall be punishable as and for contempt, and the commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the state, until it shall have complied with the requirements of section 8, and with the recommendation of the commission, and for any willful violation or failure to comply with such requirements or such recommendation of the commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs, and after due deliberation thereon, as may be just.

On the 22d of June, 1887, the Boards of Trade Union of Farmington, Northfield, Faribault and Owatonna, in Minnesota, filed with the commission a petition in writing, complaining that the Chicago, Milwaukee and St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad, for carriage or shipment from Owatonna, Faribault, Dun-

das, Northfield and Farmington to the cities of St. Paul and Minneapolis, all of those places being within the state of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield and Farmington to St. Paul and Minneapolis which were unequal and unreasonable, in that it charged four cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and three cents per gallon from Faribault, Dundas, Northfield and Farmington to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same, and adopt such rates and charges as the commission should declare to be equal and reasonable. A statement of the complaint thus made was forwarded by the commission on the 29th of June, 1887, to the railway company; and it was called upon by the commission, on the 6th of July, 1887, to satisfy the complaint, or answer it in writing, at the office of the commission in St. Paul, on the 13th of July, 1887. On the 30th of June, 1887, Mr. J. F. Tucker, the assistant general manager of the railway company, addressed a letter from Milwaukee to the secretary of the commission, saying: "I have your favor of the 29th, with complaint as to milk rates being unreasonable and unequal. They may be unequal, if unreasonable. They are unreasonably low for the service performed — by passenger train — and are twenty-five per cent less than the same commodity is charged into New York, with longer distances and hundred times larger volume in favor of New York. I am frank to say it is hard to appreciate complaints from boards of trade that one-tenth of a cent per gallon on milk handled on passenger train one mile is unreasonable. With what is the comparison made that enables such a conclusion? It's not first-class rates by freight train and was made low to encourage the trade, under the hope and promise that, when the trade were fostered, it would be advanced. This, as usual, has been forgotten." On the 13th of July, 1887, at the office of the commission in St. Paul, the company appeared by J. A. Chandler, its duly-authorized attorney, and the boards of trade union by its attorney, and the commission proceeded to investigate the complaint. An investigation of the rates charged

by the company for its services in transporting milk from Owatonna, Faribault, Dundas, Northfield and Farmington, to St. Paul and Minneapolis, was made by the commission, and it found that the charges of the company for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis was three cents per gallon in ten-gallon cans; that such charges were unequal and unreasonable; and that the company's tariff of rates for transporting milk from Owatonna and Faribault to those cities, filed and published by it as provided by chapter 10 of the Laws of 1887, was unequal and unreasonable; and the commission declared that a rate of two and one-half cents per gallon in ten-gallon cans was an equal and reasonable rate for such services. On the 4th of August, 1887, the commission made a report in writing which included the findings of fact upon which its conclusions were based, its recommendations as to the tariff which should be substituted for the tariff so found to be unequal and unreasonable, and also a specification of the rates and charges which it declared to be equal and reasonable. This paper was in the shape of a communication dated at St. Paul, August 4, 1887, signed by the secretary of the commission, and addressed to the company. It said: "It appearing from your schedule of rates and charges for the transportation of milk over and upon the Iowa and Minnesota division of your road, that you charge, collect and receive for the transportation of milk over and upon said line from Owatonna and Faribault to the cities of St. Paul and Minneapolis three cents per gallon, in ten-gallon cans, and from Dundas, Northfield and Farmington to said cities of St. Paul and Minneapolis two and one-half cents per gallon, in cans of like capacity, and complaint having been made that such rates and charges are unequal and unreasonable, and that the services performed by you in such transportation are not reasonably worth the said sums charged therefor, and this commission having thereupon, pursuant to the provisions of section 8 of an act entitled 'An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers,' approved March 7, 1887, examined the cause and reasonableness of said complaint, and finding pursuant to subdivision 'e' of said section, that your said tariff of rates, so far as appertains to the transportation of milk to the

cities of St. Paul and Minneapolis from the other places above named, and inasmuch as said tariff provides for, or requires the charging or collection of, a greater compensation than two and one-half cents per gallon, is unreasonable and excessive; therefore, said commission recommends and directs that you, the said Chicago, Milwaukee and St. Paul Railway Company, shall alter and change your said schedule by the adoption and substitution of a rate not to exceed two and one-half cents per gallon for the services aforesaid from the cities of Owatonna and Faribault, or either of them, to said St. Paul and Minneapolis. The commission, as at present advised, approves of the custom and arrangement which, it is informed, has been adopted and is now in use by the Minnesota and Northwestern Railroad Company, of collecting two and one-half cents per gallon on all milk transported by it, regardless of distance; but this expression of opinion is no part of the decision, notice or order in this case." This report was entered of record, and a copy furnished to the boards of trade union, and a copy was also delivered, on the 4th of August, 1887, to the company, with a notice to it to desist from charging or receiving such unequal and unreasonable rates for such services. The commission thus informed the company in writing in what respect such tariff of rates and charges was unequal and unreasonable, and recommended to it in writing what tariff should be substituted therefor, to-wit, the tariff so found equal and reasonable by the commission. The company neglected and refused, for more than ten days after such notice, to substitute or adopt such tariff of charges as was recommended by the commission. The latter thereupon published the tariff of charges which it had declared to be equal and reasonable, and caused it to be posted at the station of the company in Faribault on the 14th of October, 1887, and at all the regular stations on the line of the company in Minnesota prior to November 12, 1887, and in all things complied with the statute. The tariff so made, published and posted was dated October 13, 1887, and was headed: "Chicago, Milwaukee and St. Paul Railway Company. (Iowa and Minnesota division.) Freight tariff on milk from Owatonna and Faribault to St. Paul and Minneapolis, taking effect October 15, 1887," — and prescribed a charge of two and one-half cents per gallon in ten-gallon cans from either the Owatonna station or the Faribault station to either St. Paul or Min-

neapolis, to be the legal, equal and reasonable maximum charge and compensation for such service, and declared that the same was in force and effect in lieu and place of the charges and compensation theretofore demanded and received therefor by the company.

On the 6th of December, 1887, the commission, by the attorney-general of the state, made an application to the supreme court of the state for a writ of *mandamus* to compel the company to comply with the recommendation made to it by the commission, to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and Minneapolis, and to adopt the rates declared by the commission to be equal and reasonable. The application set forth the proceedings hereinbefore detailed; that the company had refused to carry out the recommendation so made, published and posted by the commission; that it continued to charge three cents per gallon for the transportation of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis; that said charge was unequal, unreasonable and excessive; that two and one-half cents per gallon for the transportation by it of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis was the maximum reasonable charge for the service; that any rate therefor in excess of two and one-half cents per gallon in ten-gallon cans was unequal, unreasonable and excessive; that three cents per gallon in ten-gallon cans was a higher rate than was charged for the same distances on passenger trains by any express company or by any other railroad company in Minnesota engaged in transporting milk to St. Paul or Minneapolis; that two and one-half cents per gallon in ten-gallon cans was the highest rate charged for like distances on passenger trains by any such company; that the milk transported by the company to St. Paul and Minneapolis, over its Iowa and Minnesota division (extending from Calmar, in Iowa, to Le Roy, in Minnesota, and from Le Roy, through Owatonna and Faribault, to St. Paul and Minneapolis), large quantities of which milk were shipped from Faribault, was so transported by the company on a passenger train which ran daily from Owatonna to St. Paul and Minneapolis; and that the company, by means of such excessive charges, subjected the traffic in milk at Faribault and Owatonna to undue and unreasonable prejudice and disadvantage. Thereupon an alternative writ of *man-*

damus was issued by the court, returnable before it on the 14th of December, 1887. On the 23d of December, 1887, the company filed its return to the alternative writ in which it set up: (1) That it was not competent for the legislature of Minnesota to delegate to a commission a power of fixing rates for transportation, and that the act of March 7, 1887, so far as it attempted to confer upon the commission power to establish rates for the transportation of freight and passengers, was void under the constitution of the state. (2) That the company, as the owner of its railroad, franchises, equipment and appurtenances, and entitled to the possession and beneficial use thereof, was authorized to establish rates for the transportation of freight and passengers, subject only to the provision that such rates should be fair and reasonable; that the establishing of such rates by the state against the will of the company was *pro tanto* a taking of its property, and depriving it thereof, without due process of law, in violation of section 1 of article 14 of the amendments to the constitution of the United States; and that the making of the order of October 13, 1887, was *pro tanto* a taking and depriving the company of its property without due process of law, in violation of said section 1, and, therefore, void and of no effect. (3) That the rate of three cents per gallon as a freight for carrying milk in ten-gallon cans on passenger trains from Owatonna and Faribault, respectively, to St. Paul and Minneapolis, was a reasonable, fair and just rate; that the rate of two and one-half cents per gallon, in ten-gallon cans, so fixed and established by the commission, was not a reasonable, fair or just compensation to the company for the service rendered; and that the establishing of such rate by the commission against the will of the company was *pro tanto* a taking of its property without due process of law, in violation of said section 1. The case came on for hearing upon the alternative writ, and the return, and the company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and the return thereto, as to whether the rate fixed by the commission was reasonable, fair and just. The court denied the application for a reference, and rendered judgment in favor of the relator, and that a peremptory writ of *mandamus* issue. An application for a reargument was made and denied. The terms of the peremptory writ were directed to be that the company comply with

the requirements of the recommendation and order made by the commission on the 4th of August, 1887, and change its tariff of rates and charges for the transportation of milk from Owatonna and Faribault to St. Paul and Minneapolis, and substitute therefor the tariff recommended, published and posted by the commission, to-wit, the rate of two and a half cents per gallon of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis, being the rates published by the commission, and declared to be equal and reasonable therefor. Costs were also adjudged against the company. To review this judgment the company has brought a writ of error.

The opinion of the supreme court is reported in 38 Minn. 281; 37 N. W. Rep'r, 782. In it the court, in the first place, construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision. It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means any thing, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission, assuming that they have proceeded in the manner pointed out by the act, should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful and, therefore, in contemplation of law, the only ones that are equal and reasonable; and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law, in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force." It then proceeded to examine the question of the validity of the act under the constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the stat-

ute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive.

The Chicago, Milwaukee and St. Paul Railway Company is a corporation organized under the laws of Wisconsin. The line of railroad owned and operated by it in the present case extends from Calmar, in Iowa, to Le Roy, in Minnesota, and from Le Roy, through Owatonna and Faribault, to St. Paul and Minneapolis, the line from Calmar to St. Paul and Minneapolis being known as the "Iowa and Minnesota division," and being wholly in Minnesota from the point where it crosses the state line between Iowa and Minnesota. It was constructed under a charter granted by the territory of Minnesota to the Minneapolis and Cedar Valley Railroad Company, by an act approved March 1, 1856 (Laws 1856, chap. 166, p. 325), to construct a railroad from the Iowa line, at or near the crossing of said line by the Cedar river, through the valley of Strait river to Minneapolis. Section 9 of that act provided that the directors of the corporation should have power to make all needful rules, regulations and by-laws touching, "the rates of toll, and the manner of collecting the same;" and section 13, that the company should have power to unite its railroad with any other railroad which was then, or thereafter might be, constructed in the territory of Minnesota, or adjoining states or territories, and should have power to consolidate its stock with any other company or companies. By an act passed March 3, 1857, chapter 99 (11 Stat. 195), the congress of the United States made a grant of land to the territory of Minnesota, to aid in constructing certain railroads. By an act of the legislature of the territory approved May 22, 1857 (Laws 1857, Extra Sess. 20), a portion of such grant was conferred upon the Minneapolis and Cedar Valley Railroad Company. Subsequently, in 1860, the state of Minnesota, by proper proceedings, became the owner of the rights, franchises and property of that company. By an act approved March 10, 1862, chapter 17 (Special Laws 1862, p. 226), the state incorporated the Minneapolis, Faribault and Cedar Valley Railroad Company and conveyed to it all the franchises and property of the Minneapolis and Cedar Valley Railroad Company which the state

had so acquired; and, by an act approved February 1, 1864 (Special Laws 1864, p. 164), the name of the Minneapolis, Faribault and Cedar Valley Railroad Company was changed to that of the Minnesota Central Railway Company. That company constructed the road from Minneapolis and St. Paul to Le Roy, in Minnesota; and the road from Le Roy to Calmar, in Iowa, and thence to McGregor, in the latter state, was consolidated with it. In August, 1867, the entire road from McGregor, by way of Calmar, Le Roy, Austin, Owatonna and Faribault, to St. Paul and Minneapolis, was conveyed to the Chicago, Milwaukee and St. Paul Railway Company, which succeeded to all the franchises so granted to the Minneapolis and Cedar Valley Railroad Company.

It is contended for the railway company that the state of Minnesota is bound by the contract made by the territory in the charter granted to the Minneapolis and Cedar Valley Railroad Company; that a contract existed that the company should have the power of regulating its rates of toll; that any legislation by the state infringing upon that right impairs the obligation of the contract; that there was no provision in the charter or in any general statute reserving to the territory or to the state the right to alter or amend the charter; and that no subsequent legislation of the territory or of the state could deprive the directors of the company of the power to fix its rates of toll subject only to the general provision of law that such rates should be reasonable. But we are of opinion that the general language of the ninth section of the charter of the Minneapolis and Cedar Valley Railroad Company cannot be held to constitute an irrevocable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the state. It was held by this court in *Railroad Co. v. Miller*, 132 U. S. 75, in accordance with a long course of decisions both in the state courts and in this court, that a railroad corporation takes its charter, containing a kindred provision with that in question, subject to the general law of the state, and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject-matter involved;

and that exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear, with express words. There is nothing in the mere grant of power, by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, which can be properly interpreted as authorizing us to hold that the state parted with its general authority itself to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company. In *Stone v. Trust Co.*, 116 U. S. 307; 325; 6 Sup. Ct. Rep'r, 334, 388, 1191, the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at that the right of a state reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant, or words equivalent in law; and that a statute which grants to a railroad company the right, "from time to time, to fix, regulate and receive the tolls and charges by them to be received for transportation," does not deprive the state of its power, within the limits of its general authority, as controlled by the constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the court said (116 U. S. 331; 6 Sup. Ct. Rep'r, 345): "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

The construction put upon the statute by the supreme court of Minnesota must be accepted by this court, for the purposes of the

present case, as conclusive, and not to be re-examined here as to its propriety or accuracy. The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law, the only ones that are equal and reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse except the violation on law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice. Under section 8 of the statute, which the supreme court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same, and adopt

such charge as the commission "shall declare to be equal and reasonable;" and to that end it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission—in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at. By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the supreme court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. It is provided by section 4 of article 10 of constitution of Minnesota of 1857, that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," and that "all corporations, being common carriers, enjoying the right of way

in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions and manufactures on equal and reasonable terms." It is thus perceived that the provision of section 2 of the statute in question is one enacted in conformity with the constitution of Minnesota.

The issuing of the peremptory writ of *mandamus* in this case was, therefore, unlawful, because in violation of the constitution of the United States ; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the supreme court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court. In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a *mandamus*, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review ; and the judgment of this court is that the judgment of the supreme court of Minnesota, entered May 4, 1888, awarding a peremptory writ of *mandamus* in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.

Bradley, Gray, and Lamar, JJ., dissent.

MILLER, J. I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions.

1. In regard to the business of common carriers limited to points within a single state, that state has the legislative power to establish the rates of compensation for such carriage.

2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the legislature of Minnesota by the act now under consideration.

3. Neither the legislature, nor such commission acting under the authority of the legislature, can establish arbitrarily, and with-

out regard to justice and right, a tariff of rates for such transportation which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation, on the other.

4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

5. But until the judiciary has been appealed to, to declare the regulations made, whether by the legislature or by the commission, voidable, for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature, or by its commission, is by a bill in chancery asserting its unreasonable character, and its conflict with the constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

8. But in the present case, where an application is made to the supreme court of the state to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission, before granting such relief, that it would have if called upon so to do by a bill in chancery.

9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary — which I think it is not — for the legislature to have given such notice if it had established such rates by legislative enactment.

10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice, and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the supreme court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company; and, if this be a just construction of the statute of Minnesota, it is for that reason void.

BRADLEY, J. (dissenting). I cannot agree to the decision of the court in this case. It practically overrules *Munn v. Illinois*, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative, and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the state itself. It is chartered as an agent of the state for furnishing public accommodation. The state might build its railroads, if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the legislature to fix the tolls to be paid by those who use it; when a company is chartered, not only to build a road, but to carry on public

transportation upon it, it is for the legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy, as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterward, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable—express, when so declared by statute; implied by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will. Thus the legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat, when the legislature declares that the charges shall be reasonable or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable. This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary. I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial by prescribing the rule that the charges shall be reasonable, and leaving it there.

It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made, we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads, and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which,

it seems to me, with all due deference to the judgment of my brethren, it has no right to make. The assertion of jurisdiction by this court makes it the duty of every court of general jurisdiction, state or federal, to entertain complaints against the decisions of the boards of commissioners appointed by the states to regulate their railroads; for all courts are bound by the constitution of the United States, the same as we are. Our jurisdiction is merely appellate. The incongruity of this position will appear more distinctly by a reference to the nature of the cases under consideration. The question presented before the commission in each case was one relating simply to the reasonableness of the rates charged by the companies—a question of more or less. In the one case the company charged three cents per gallon for carrying milk between certain points. The commission deemed this to be unreasonable, and reduced the charge to two and half cents. In the other case the company charged \$1.25 per car for handling and switching empty cars over its lines within the city of Minneapolis, and \$1.50 for loaded cars; and the commission decided that \$1 per car was a sufficient charge in all cases. The companies complain that the charges as fixed by the commission are unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative commission. The state court held that the legislature had a right to establish such a commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the state court was right; and the establishment of the commission, and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.

I think it is perfectly clear, and well settled by the decisions of this court, that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the legislature itself could do this, acting by its committees, and proceeding according to the

usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth, and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might or it might not swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command; just as they would be at the command of the legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it. In the case of *Davidson v. City of New Orleans*, 96 U. S. 97, we decided that the appointment of a board of assessors for assessing damages was not only due process of law, but the proper method for making assessments to distribute the burden of a public work among those who were benefited by it. No one questions the constitutionality or propriety of boards for assessing property for taxation, or for the improvement of streets, sewers and the like, or of commissions to establish county seats, and for doing many other things appertaining to the administrative management of public affairs. Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. In the *Railroad Commission Cases*, 116 U. S. 307; 6 Sup. Ct. Rep'r, 334-350, 388, 391, 1191, we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a state. It seems to me, therefore, that the law of Minnesota did not prescribe any thing that was not in accordance with due process of law in creating such a board, and investing it with the powers in question.

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect — courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive, unless an appeal is given therefrom. The important question always is,

what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose.

If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was that no state shall take private property for public use without just compensation, and as if it was our duty to judge of the compensation. But there is no such clause in the constitution of the United States. The fifth amendment is prohibitory upon the federal government only, and not upon the state governments. In this matter — just compensation for property taken for public use — the states make their own regulations, by constitution or otherwise. They are only required by the federal constitution to provide “due process of law.” It was alleged in *Davidson v. New Orleans* that the property assessed was not benefited by the improvement; but we held that that was a matter with which we would not interfere. The question was whether there was due process of law. 96 U. S. 106. If a state court renders an unjust judgment, we cannot remedy it.

I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction (as in these cases they have done), the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The legislature, in establishing the commission, did not exceed its power; and the commission, in acting upon the cases, did not exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount between the commission and the companies, without any indication of intent on the part of the former to do injustice. The board may have erred, but if they did, as the matter was within their rightful jurisdiction their decision was final and conclusive, unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these

cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction. It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the constitution of our republican form of government, and we are bound to abide by it till it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands. They may at any time restrain them by constitutional limitations. But, so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers; among which, in my judgment, is that of the regulation of railroads and other public means of intercommunication, and the burden and charges which those who own them are authorized to impose upon the public.

I am authorized to say that Mr. Justice Gray and Mr. Justice Lamar agree with me in this dissenting opinion.

Another case arising under the same statute as the foregoing case and decided at the same time is *Minneapolis Eastern Ry. Co. v. State of Minnesota ex rel.*, etc., 10 Sup. Ct. Rep'r, 473; 134 U. S. 467. After stating the facts the court conclude as follows:

"The supreme court rendered an opinion (41 N. W. Rep'r, 465) stating that, as the case was similar to that of *State v. Railway Co.* (before decided by it, 37 N. W. Rep'r, 782), the decision would follow the decision in that case, and upon the reasons stated in the opinion filed therein. The views and considerations applicable to that case (*Railway Co. v. State*, which has just been decided by us) apply with even greater force to the present case, as appears by the return above set forth at length. The Minneapolis Eastern Railway Company was organized as a corporation in June, 1878, under title 1, chapter 34, of the General Statutes of Minnesota. By section 2 of an act of the legislature approved March 8, 1869 (Laws 1869, chap. 78, p. 95) it was provided "that any railroad company or corporation organized under the title to which this is an amendment, may charge and receive for the transportation of passengers and freight on their road such reasonable rate as may be from time to time fixed by said corporation or prescribed by law." By section 8 of chapter 108 of the General Laws of Minnesota of 1875, it was provided as follows: "No railroad company shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of any freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation." We do not perceive that these statutory provisions

constitute such a contract with the corporation, as to the fixing by it of its rates of charges, as to deprive the legislature of its power to regulate those charges. The decision of the commission in the present case appears to be merely a general finding that each and every charge in excess of \$1 per car for switching within the limits of the city of Minneapolis is an unreasonable and excessive compensation for the service performed. The commission states that it made such finding after due and careful inquiry and consideration; but it does not appear that the Minneapolis Eastern Railway Company had any prior notice of any hearing at which such finding was made, or any opportunity of being heard in regard thereto, while it does appear that it asked leave of the court to make proof of the matters so set up in its return; that its request was denied and that it excepted to such denial; and it further appears by its return that it claimed that the rate of \$1 per car would be so unfair, unequal, unjust and unreasonable as to take its property against its will, without due process of law. For the reasons set forth in the other case, just decided, the judgment of the supreme court of Minnesota, rendered February 27, 1889, awarding a peremptory writ of *mandamus* against the railway company, is reversed, and the case is remanded to that court with an instruction to take further proceedings not inconsistent with the opinion of this court."

POWER OF THE LEGISLATURE TO REGULATE CHARGES.

1. **Existence of the power.**—The existence of a right or power in the state to regulate or fix the charges which may be lawfully demanded for certain services or commodities, is evidenced by an almost immemorial exercise of such right in England and America and is established in this country by a long line of decisions by the supreme court of the United States, terminating with the cases just reported. *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago, etc., Ry. Co.*, 94 U. S. 164; *Chicago, etc., R. Co. v. Ackley*, 94 U. S. 179; *Ruggles v. Illinois*, 108 U. S. 526; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Stone v. Illinois Central R. Co.*, 116 U. S. 347; *Stone v. New Orleans, etc., R. Co.*, 116 U. S. 352; *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557; *Dow v. Beidelman*, 125 U. S. 680; *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174.

2. **To what services, commodities and employments the power extends**—The right to exercise this power in the case of common carriers, telegraph and telephone companies, inn-keepers, hackmen, draymen, turnpikes, bridges, ferries, public millers and all persons or corporations exercising any franchise or privilege emanating from the government, has long been practiced and is now generally regarded as beyond question. See the cases above cited and also *Hockett v. State*, 105 Ind. 250; *Chesapeake, etc., Tel. Co. v. B. & O. Tel. Co.*, 66 Md. 399; *Nash v. Page*, 80 Ky. 539; *Hines v. Wilmington, etc., R. Co.*, 95 N. C. 434; *Commonwealth v. Housatonic R. Co.*, 143 Mass. 264; *Davis v. State*, 68 Ala. 58. The right to fix the price for the use of money or the rate of interest has been so long and so generally exercised that no one would now expect to successfully resist it. The right to regulate the charges for warehousing grain may be regarded as settled by the following cases:

Munn v. Illinois, 94 U. S. 113; S. C., 69 Ill. 80; People v. Budd, 117 N. Y. 1. And see Aldnutt v. Inglis, 12 East, 527. In Mobile v. Yuille, 3 Ala. 137, it was held competent for the city of Mobile, by ordinance, to fix the weight and price of bread, the authority to do so having been expressly granted by the legislature. Although this decision is apparently referred to with approval in the opinion of the court in Munn v. Illinois, 94 U. S. 129, the correctness of the conclusion is questioned by Judge Cooley, who says: "Regulating the weight of bread is common, and necessary to prevent imposition; but regulating the price of bread we should suppose would now meet with such resistance anywhere, as would require a distinct determination upon its constitutional rightfulness. How the baker can have the price of that which he sells prescribed to him, and not the merchant or the day laborer, is not apparent. Indeed, to admit the power seems to render necessary the recognition of the principle that there is and can be no limit to legislative interference but such as legislative discretion from time to time may prescribe." Const. Lim. (5th ed.), p. 736, note.

From the foregoing authorities may be derived the general proposition that when a property or business is "affected with a public interest" or "devoted to a public use" it is subject to regulation by the state. Chief Justice Waite in the Munn case says:

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking then to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

And after adverting to authorities he proceeds: "But we need go no further. Enough has already been said to show that, when property is devoted to a public use, it is subject to public regulation." Page 130. It would seem that the chief justice intends the same thing by "property devoted to a public use," and by "property affected with a public interest." The latter expression being the broader of the two may be used to comprehend both.

The important question then arises as to when a property or business is so "affected with a public interest" as to be subject to police regulation. Judge Cooley returns the following answer:

"In the following cases we should say that property in business was affected with a public interest: (1) Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving

shows, etc., of keeping billiard-tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll-bridges, etc. (2) Where the state on public grounds renders to the business special assistance, by taxation or otherwise. (3) Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. (4) Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases." Cooley Const. Lim., p. 739 (5th ed.).

Another author says: "A most interesting question, somewhat like, and resting upon the same grounds as the one discussed in the preceding section, is the right of the government to regulate prices and charges for things and services. The exercise of this power was quite common in past ages; and there appeared to be no well-defined limitations upon the power, if any at all were recognized. But under a constitutional and popular government, there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the state, that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the basis of the business relation or transaction. It is, therefore, the general rule, that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay; and no one can compel him to take less, although the price may be so exorbitant as to become extortionate. No one has a natural right to the enjoyment of another's property or services upon the payment of a reasonable compensation, for we have already recognized the right of one man to refuse to have dealings with another on any terms, whatever may be the motive for his refusal. But there are exceptions to the rule which can be justified on constitutional grounds. This general freedom from the state regulation of prices and charges can only be claimed as a natural right so far as the business is itself of a private character, and is not connected with, or rendered more valuable by the enjoyment of some special privilege or franchise. Whenever the business is itself a privilege or franchise, not enjoyed by all alike, or the business is materially benefited by the gift by the state of some special privileges to be enjoyed in connection with it, the business ceases to be strictly private, and becomes a *quasi* public business, and to that extent may be subjected to police regulation. A special privilege or franchise is granted to individuals because of some supposed benefit to the public, and in order that the benefit may be assured to the public, the state may justly institute regulations to that end. The regulation of prices in such cases will, therefore, be legitimate and constitutional.

"But the regulation of prices will not be justified in any case where the law merely declares the prosecution of the business to be a privilege or franchise. If it be without legislation a natural right, no law can make it a privilege by requiring a license. The deprivation of the natural right to carry on the business must be justifiable by some public reason or necessity. Otherwise the general or partial prohibition is unconstitutional, and furnishes no justification for the regulation of prices and charges, incident to the business." Tiedeman Limitations of Police Power, p. 233.

According to these writers the right of regulation is a correlative of the possession or enjoyment of some privilege or franchise permitted by, or emanating from, the public.

The question under discussion has lately received very elaborate consideration in the court of appeals of New York in the case of *People v. Budd*, 117 N. Y. 1. This case was similar to the *Munn* case and involved the right of the state to regulate the charges for elevating and storing grain. Andrews, J., delivered the opinion of the court, and Gray and Peckham, JJ., filed elaborate dissenting opinions. The validity of the statute was sustained and the conclusion of the court is thus stated: "We rest the power of the legislature to control and regulate elevator charges in the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state and the practice of legislation in analogous cases. These circumstances, collectively, create an exceptional case and justify legislative regulation." Page 27. In afterward referring to what was decided in the *Munn* case, Bradley, J., of the supreme court of the United States, makes use of the following language: "The inquiry there was as to the extent of the police power where the public interest is affected; and we held that where an employment becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." *Sinking Fund Cases*, 99 U. S. 747.

The *Munn* case has been subjected to much criticism, judicial and otherwise. It has been said to be without a precedent. See note to the case in 16 Am. Law Reg. (U. S.) 526. But it is no new thing for courts to make precedents, and, in the changing conditions of our civilization, new precedents become necessary and are entirely consistent with the principles of our jurisprudence.

It may be urged that the principle of that case involves the right to regulate any private business whatever; that the business of elevating grain does not differ in any essential particular from the business of the dry goods merchant; that neither the one nor the other enjoys any franchise, privilege, aid or peculiar protection from the public; that neither makes use of any property, easement or right belonging to the public; that both are alike conducted on private property, with private capital and by private persons or corporations. See dissenting opinion of Peckham, J., in *People v. Budd*, 117 N. Y., 54, 48-51. But after all these similitudes have been pointed out the fact remains and is recognized by everybody that there is a difference between the business of elevating grain as at present conducted and the business of dealing in dry goods, however difficult it may be to define that difference in words. And there is no reason why any particular kind of business should not be subjected to state regulation whenever it assumes such relations to the public interests that the public welfare demands it. It is not too much to say, in view of the marvellous development and changes which have occurred in industrial matters in the last fifty years, that this may happen with respect to any business which may be specified.

It is no objection that the power as thus recognized, is undefined. Many things in our system of jurisprudence are undefined and are studiously allowed to remain so. The very fact that a certain undefined power exists in the legislature to impose restraints and regulations upon business and employments, will itself exert a salutary effect. Though the general scope of the power is undefined, the concrete applications already made and sanctioned by the courts are a sufficient indication, for all practicable purposes, of the general limits of the power. The fact that no regulation can be established and sustained without the concurrence of both the legislature and the courts, is a sufficient safeguard for both public and private rights. The best general statement of the principle to be derived from the decisions under discussion, is given by Andrews, J., who says: "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." *People v. Budd*, 117 N. Y. 27.

We also refer to the concluding remarks of the same judge in the opinion above referred to, in support of our position.

"The criticism to which the *Munn* case has been subjected has proceeded mainly on a limited and strict construction and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exercised in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property, and the use of property, so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the case of *People v. King*, 110 N. Y. 418, it was given a much broader scope and was held to be efficient to prevent discrimination on the ground of race and color in places opened for public entertainments. In that case the owner of the skating rink derived no special privilege or protection from the state. The public had no right in any legal sense to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole community or any individual citizen. But it was held that so long as he devoted his place to purposes of public entertainment, he subjected it to public regulation. There is little reason under our system of government, for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which has been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power and invested it with the prerogative of bringing every legislative act to the test of the constitution. But

no serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which, sooner or later, is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberrations may have marked its course. So, also, in that wide range of legislative powers over persons and property, which lie outside of the prohibitions of the constitution, and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of a tremendous force against unwise and impolitic legislation, hampering individual enterprise, and checking the healthful stimulus of self-interest, which are the life blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy, if, at the bottom, the legislation under it is oppressive and unjust. The remedy by taking away the power of the legislature to act at all, would, indeed, be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules, a danger is introduced into our system which would, we think, be far greater than results from an occasional departure by the legislature from correct principles of government." *People v. Budd*, 117 N. Y. 1, 27-29.

3. **Limitations of the power.**—The effect of the decision in the Minnesota cases is to limit the legislature to the right to establish reasonable rates only, on the ground that the enforcement of a charge for any service or commodity which is unreasonably low, by mere legislative enactment, is to deprive the party affected of his property without due process of law and to deny him the equal protection of the laws. The same conclusions had been reached by other courts in advance of the decisions referred to. *Pensacola, etc., R. Co. v. State (Fla.)*, 5 So. Rep'r, 883; *State v. Fremont, etc., R. Co.*, 36 N. W. Rep'r, 805; 35 N. W. Rep'r, 118. See, also, the decisions of *Brewer, J.*, in *Chicago, etc., R. Co. v. Dey et al.*, 35 Fed. Rep'r, 866, and *Chicago, etc., R. Co. v. Becker*, 35 Fed. Rep'r, 888. Various questions of interest and importance will arise in giving effect to these decisions of the supreme court, among which are: (1) What will be the effect of rates established by the legislature or by commissioners without judicial inquiry? (2) How may the reasonableness of such rates be questioned or determined? (3) By what kind of a judicial proceeding must rates be established in order to satisfy the requirements of the law?

4. **Effect of rates established without judicial inquiry and how may the reasonableness of such rates be questioned or determined?**—It would seem that rates fixed by an act of the legislature or by a commission acting pursuant to statute should be regarded as *prima facie* equal and reasonable. It was so held in *Pensacola, etc., R. Co. v. State (Fla.)*, 5 So. Rep'r, 883, and *State v. Fremont, etc., R. Co. (Neb.)*, 36 N. W. Rep'r, 805, and there are some intimations to that effect in *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 456 et seq. And see the concurring opinion of Justice Miller, page 460.

The Minnesota cases reported (134 U. S. 418 and 467), were proceedings by *mandamus* at the relation of the railroad commissioners to compel the defendant

company to conform to the rates established by the commission. It is clearly implied in the opinion of the court that it would be competent to investigate the reasonableness of the rates in question in that proceeding. See conclusion of the opinion, ante, page 578. Justice Miller in his concurring opinion expressly states that this would be a proper mode of procedure, ante, page 579. In *State v. Fremont, etc.*, R. Co., 36 N. W. Rep'r, 305, which was a precisely similar proceeding, it was held that if the reasonableness of the rates established by the commission was denied, the question must be determined like any other question of fact in a judicial proceeding. It would seem from these authorities, as well as upon principle, that in a proceeding by *mandamus* to compel conformity to the rates established, it is competent to make an issue upon the reasonableness of the rates in question, and to try that issue according to the forms of procedure in such cases.

Justice Miller also says in his concurring opinion: "That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill of chancery asserting its unreasonable character and its conflict with the constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the services rendered.

"That until this is done it is not competent for each individual, having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method." *Chicago, etc., Ry. v. Minnesota*, 134 U. S. 418, 460.

In the following cases bills in chancery were filed by the railroad companies affected, and in one case by the bondholders of the company, against the attorney-general of the state or the railroad commissioners or both, to enjoin the defendants from enforcing the rates prescribed by statute or established by the commissioners, and no question appears to have been made as to the jurisdiction of a court of equity or the propriety of the remedy sought. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Stone v. Illinois Central R. Co.*, 116 U. S. 347; *Stone v. New Orleans, etc., R. Co.*, 116 U. S. 353; *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174; *Chicago, etc., R. Co. v. Dey et al.*, 35 Fed. Rep'r, 866; *Chicago, etc., R. Co. v. Becker*, 35 Fed. Rep'r, 883.

The case of *Pensacola, etc., R. Co. v. State (Fla.)*, 5 So. Rep'r, 838, was a suit against the railroad company to recover a penalty denounced by statute for exacting of a passenger more than the rate fixed by the commission. The company filed four pleas to which demurrers were sustained, and judgment was rendered against the company for want of a sufficient plea. The first plea was that the rate charged for passengers was *reasonable*. The second was that the passenger rate fixed by the commissioners was *unreasonable*. The supreme court held that these pleas were bad for the reason that the rates established by the commission must be considered as an entirety, and if, as a whole, they afforded the company a reasonable return it was sufficient, and that the rates for a particular article or service could not be attacked separately. The

third plea was that the company could not pay the expenses of operating its road by charging for transportation of persons and things the rates fixed therefor by the railroad commissioners, or by charging less rates than those fixed by the company. The court held that this was a good plea in bar and that, upon issue joined, the burden would be upon the company to show that the rates established by the commission were not reasonable. The fourth plea set up a variety of facts in regard to the cost and business of the road, which the court said left the matter in doubt, and they, therefore, held the plea bad.

5. By what kind of a judicial proceeding must rates be established in order to satisfy the requirements of the law.—It is clearly implied by the court in the cases reported that, if the Minnesota law had provided for a hearing before the commissioners upon due notice to the company to be affected, its conclusions would have been valid and binding, ante, p. 577. There is nothing in the nature of a proceeding to establish rates which requires an appeal to the courts. If an impartial tribunal is provided, such as a railroad commission may be supposed to be, and the parties to be affected have reasonable notice to appear before it and reasonable opportunity to be heard in reference to any proposed action in regard to rates, its orders and judgments in the matter will be conclusive and valid. Such a proceeding is due process of law within the meaning of the constitution. The case is very similar to a proceeding to ascertain the just compensation to be paid for property taken for public use, and nearly all the courts hold that, in the absence of some special constitutional provision to the contrary, such compensation may be settled by any impartial tribunal, provided the parties in interest have notice and an opportunity to be heard. *Davidson v. New Orleans*, 96 U. S. 97; *United States v. Jones*, 109 U. S. 518; *Wurts v. Hoagland*, 114 U. S. 606; *Virginia & Truckee R. Co. v. Elliott*, 5 Nev. 358; *Raleigh & Gaston R. Co. v. Davis*, 2 Dev. & B. Law, 451; *Kramer v. Cleveland, etc., R. Co.*, 5 Ohio St. 140; *New Orleans, etc., R. Co. v. Drake*, 60 Miss. 621; *Evansville, etc., R. Co. v. Miller*, 30 Ind. 209; *Indianapolis v. Cumberland Gravel Road Co.*, 98 Ind. 360; *Ames v. Lake Superior, etc., R. Co.*, 21 Minn. 241; *Rhine v. McKinney*, 53 Tex. 354; *Koppikus v. State Capitol Comrs.*, 16 Cal. 248; *Longford v. County Comrs.*, 16 Minn. 375; *Bruggerman v. True*, 25 Minn. 123; *Uhrig v. St. Louis*, 44 Mo., 458; *Zimmerman v. Canfield*, 43 Ohio St. 463; *Gamble v. McCrady*, 75 N. C. 509; *Harniss v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248; *Bass v. Ft. Wayne*, 1 Am. R. R. & Corp. Rep. 173.

6. When is the regulation of rates precluded by charter provisions.—In *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, the charter in question provided "that it shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive the toll and charges by them to be received for transportation of persons or property on their railroad, or way aforesaid." It was held that this did not preclude the regulation of the charges of the company in question by the legislature through the agency of a commission. The court say: "This would have been implied from the rest of the charter if there had been no such provision, and it is argued that, unless it had been intended to surrender the power of control over fares and freights, this section would not have been inserted. The argument concedes that the power of the company under this section is limited by the rule of the common law which

requires all charges to be reasonable. In *Munn v. Illinois*, 94 U. S. 118, and *Chicago, Burlington & Quincy Railroad Co., Iowa*, above cited, this court decided that as to natural persons and corporations subject to legislative control, the state could, in cases like this, fix a maximum beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by section 12 the state has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the state had in the matter before the charter it retained afterward. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power it would have been easy to say so. Not having said so the conclusive presumption is there was no such intention." Pages 329, 330.

In *Stone v. Illinois Central R. Co.*, 116 U. S. 347, the charter in question provided as follows: "That the president and directors be, and they are hereby, authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure." This case was also an appeal from Mississippi and involved the same railroad commission law as the case last cited. It was held to come "clearly within the rulings" in the latter case. In *Stone v. New Orleans, etc., R. Co.*, 116 U. S. 352, the charter was similar to that in *Stone v. Farmers' Loan & Trust Co.*, supra, but it also contained a proviso "that nothing contained in the charter shall be so construed as to prevent the legislature from regulating the rate of transportation for passage and freight over the same in this state." The same decision was made as in the two cases previously cited.

In *Ruggles v. Illinois*, 108 U. S. 526, the case was held to turn upon section 6 of an amendment to the charter which was as follows:

"Section 6. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interest of the company: Provided, That the same be not repugnant to the constitution and laws of the United States, or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respecting the use of said

road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine."

It was held that this section did not preclude the legislature from establishing a maximum of rates applicable to the company in question. The court says:

"When, therefore, in a section of the charter which expressly declares that no by-law shall be made that is in conflict with the laws of the state, we find that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-laws, the conclusion is irresistible that only such charges can be collected as are allowed by the laws of the state. This implies that, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common-law limitation of reasonableness, for, in the absence of a statute or other appropriate indication of the legislative will, the common law forms part of the laws of the state to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that when a maximum is so established the rates fixed by the directors must conform to its requirements, otherwise the by-laws will be repugnant to the laws." *Ruggles v. Illinois*, 106 U. S. 526, 533.

In *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, the charter considered provided as follows: "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot on articles of measurement for every one hundred miles, and five cents per mile for every passenger." It was claimed that this was a contract that the company might charge up to the prescribed limits and that the state could not enforce rates less than the maximum fixed by the charter without impairing the contract. The supreme court held that there was no such contract as was contended for and that a schedule of rates less than the maximum prescribed in the charter, duly fixed by authority of law, was binding on the company. The court says, speaking of the provision in question:

"It contains no stipulation, nor is any implied, as to any future action of the legislature. If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated.

"It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligations of contracts. If the charter in this way provides that the charges, which the company may make for its services in the

transportation of persons and property, shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state. There is no such language in the present case. The contention of the plaintiff in error, therefore, fails, and the judgment must be affirmed." Pages 181, 182.

Where the right is reserved to alter, repeal or amend the charter of a corporation, engaged in business of a public nature, there is no question as to the power of the legislature to regulate its charges. *Dow v. Beidleman*, 125 U. S. 680; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Peik v. Chicago & Northwestern Ry. Co.*, 94 U. S. 164.

7. The states have no power to regulate charges for interstate commerce. — This was held in the case of *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, which related to the transportation of commodities from points within Illinois to New York city. Three of the judges united in a dissenting opinion and the two opinions review most of the cases on the subject up to that time. To the same effect are *Commonwealth v. Housatonic R. Co.*, 143 Mass. 264; *Hardy v. Atchison, etc., R. Co.*, 82 Kans. 698; *State v. Chicago & N. W. R. Co.*, 70 Iowa, 162. Contra, *Providence Coal Co. v. Providence, etc., R. Co.*, 15 R. I. 308. Transportation from one point to another in the same state, over a route which lies partly without the state, is held to be interstate commerce in *Sternberger v. Cape Fear, etc., R. Co.*, 7 S. E. Rep'r, 838; *State v. Chicago, etc., R. Co.*, 40 Minn. 267; *New Orleans Cotton Exchange v. Cincinnati, etc., Ry. Co.*, 2 Interst. Com. Rep'r, 375. Contra, *Commonwealth v. Lehigh Valley R. Co. (Penn.)*, 17 Atl. Rep'r, 179; 18 Atl. Rep'r, 125.

For a discussion of the subject of interstate commerce see post, *McCall v. California and Norfolk, etc., R. Co. v. Pennsylvania*, and notes.

KNEELAND V. AMERICAN LOAN & TRUST CO. ET AL.

SAME V. BALLOU.

(10 Sup. Ct. R. 950; 136 U. S. 89.)

1. RAILROAD FORECLOSURE. RIGHT OF PURCHASER TO APPEAL. The court states its conclusions in the following propositions: "(1) A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions, thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. (2) Where not concluded by the terms of the decree, any subsequent rulings which determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court."

2. PRIORITY OF CLAIM FOR RENTAL OR USE OF ROLLING STOCK. On August 1, 1883, a judgment creditor filed his bills, making the trustees in the several mortgages parties, and a receiver was appointed, the mortgagees neither consenting nor objecting. On December 1 of the same year the trustees in the several mortgages filed bills for the foreclosure of their mortgages and a receiver was appointed thereunder. Prior to any of these proceedings the railroad company had purchased certain rolling stock, the vendors reserving title until payment of certain annual sums called rents and with the right to retake possession upon default in payment. It was held that the claim for use or rental of this rolling stock from August 1 to December 1 was not prior to the mortgage liens, but that the prayer of the trustees for a receivership including this rolling stock, was a consent that the value of its use, or the balance of purchase-money, should be paid, and that the claim for such rental or use from December 1 was prior to the mortgage liens.

3. RENTAL OF ROLLING STOCK, HOW ESTIMATED. The trustees having prayed for a receivership of the entire property and the rolling stock being in excess of that required for the operation of the road, the rental should be fixed at the fair value of the use of such property and not on the "mileage system," as the trustees, if they were not willing to pay the fair rental value of the whole, should have limited their prayer to so much as was necessary for the proper operation of the road.

Robert G. Ingersoll, Clarence Brown and John M. Butler for appellant. *James L. High, Henry D. Hyde and Bluford Wilson* for appellees.

BREWER, J. These cases were argued and are considered together, the questions involved being similar, and growing out of the same foreclosure suits. In a general way, it may be stated that they arise between a purchaser at foreclosure sales of certain railroad property, and intervening creditors. The initial question is as to the right of appellant, the purchaser, to his appeal. It is urged that a purchaser at a sale under a decree has no right to appeal from its terms. He takes under it. His purchase is a voluntary act, and, coming in voluntarily to take under a decree, he may not challenge that under which he takes. The contention of appellant is that his attitude is not thus limited; that his appeal is not from the decree of sale under which he purchased, but from orders made thereafter respecting his bid, the modes of payment thereof, and the debts to which it should be applied — matters in which he was interested, and in respect to which, by the terms of the decree of sale, he was given a right of appeal; and that such right springs not alone from the grant of the right of appeal, but

also from his relations to the matters determined and adjudged in these subsequent proceedings, and by the final decree. For a correct solution of this question, a statement more in detail of the facts is essential.

Decrees of foreclosure (for there were separate divisions, the Toledo and the St. Louis divisions), separate suits and several mortgages, were entered on the 12th day of November, 1885. It is sufficient, however, to notice the proceedings in one; for there was no substantial difference between the cases. It contained these provisions: "The complainants herein, and the purchaser or purchasers at the foreclosure sale under this decree, reserve the right to appeal from any orders and final decrees made by the court directing and decreeing the payment of claims and debts found and determined and adjudged and decreed to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the lien of said first deed of trust and mortgage herein, and hereby foreclosed, if they shall be so advised." "In making payment of any surplus of said purchase-money left after full payment of the court and receiver's indebtedness, the purchaser or purchasers shall be allowed to pay said surplus in the bonds and coupons to which the same may be applicable, as hereinabove provided; each such coupon and bond being received by the master for such sum as the holder thereof is entitled to receive under the distribution herein provided, and according to the priorities herein adjudged." So that by the decree the bidders at the sale were notified in advance of their right to be heard, both in the trial and appellate courts, upon the question of what amounts should be paid to intervening creditors, and what in the bonds secured by the mortgages. Common experience is that intervening claims have to be paid in cash, while the mortgage bonds of a defaulting and insolvent corporation are generally purchasable much below par. In this case the enormous disproportion between the amount of outstanding bonds and the value of the property suggests that those bonds must have been purchasable at a very low price, and, therefore, that the question of the amount of intervening claims finally to be charged upon the property was a matter affecting materially the interests of the purchaser and the right to be heard upon it — one which would largely determine the amount of his bid.

Further, on February 23, 1886, when the master had reported upon the intervening claims, the appellant, among others, filed exceptions to that report, in the following words: "Come now, James M. Quigley, Charles T. Harbeck, John McNab, Halsey J. Boardman and Warren D. Hobb, complainants in said causes, and committees representing bondholders holding bonds secured by mortgages on said railroad and property in said causes involved, and the Central Trust Company, trustee in the mortgages in said causes foreclosed, and Sylvester H. Kneeland, purchaser of said railroad and property sold at foreclosure sale under decrees rendered and entered in said above-entitled causes, and owner of and trustee for a vast majority of said mortgage bonds, and now except to each and every of the master's findings and report herein; and said complainants and said purchaser, for their exceptions, assign the following causes." And in the final decree thereon the exception and allowance of appeal are stated as follows: "To this decree the said Sylvester H. Kneeland, as purchaser and trustee representing the first mortgage bondholders on said entire line of railroad, concerning both divisions from Toledo, Ohio, to East St. Louis, Ill., now excepts, and prays an appeal to the supreme court of the United States, which is granted, to operate as a *supersedeas*, on giving bond in the sum of \$200,000, which is now filed, with the American Surety Company of New York as surety, and the same is approved by the court; the court, however, reserving the right to resume possession of the property on the terms mentioned in the order confirming the sale and approving the deed." It appears also that in the early part of these foreclosure proceedings a committee, consisting of James M. Quigley and others, was appointed to represent the bondholders, with authority to employ agents, etc. This committee, by leave of the court, was made co-complainant. It is stated by counsel, though that fact does not appear in the record, that a contract between this committee and Mr. Kneeland, with reference to a purchase in the interest and for the benefit of the bondholders, was presented to the court at the time of signing the decree of sale, and that it was upon that that the provision reserving an appeal to the purchaser was inserted. While no such agreement is found in the record, and, therefore, cannot be a subject of consideration, yet obviously the language in the decree of foreclos-

ure, as well as that of confirmation, suggests that something of the kind must have been presented to the attention of the court. Upon these facts, can the appellant's right to an appeal be sustained?

It was adjudged in *Blossom v. Railroad Co.*, 1 Wall. 655, that a bidder at a marshal's sale makes himself thereby so far a party to the proceedings that, for some purposes, he has a right of appeal. It was said by Mr. Justice Miller, in the opinion of the court, that "it is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders, and that they may in like manner acquire rights in regard to the subject-matter of the litigation which the court is bound to protect." "A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim at the hands of the court such relief as the rules of equity proceedings entitle him to." It follows from this decision that his right of appeal must extend to all matters adjudicated after his bid which affect the terms of that bid or the burdens which he assumes thereby and which are not withdrawn from his challenge by the terms of the decree under which he purchases. If by the decree the sale is to be made subject to certain conditions, the purchaser acquires no right to be heard as to those conditions either in the trial or appellate courts. Such was the ruling in *Swann v. Wright's Ex'r*, 110 U. S. 500; 4 Sup. Ct. Rep'r, 235, in which it was adjudged that, where a decree directed that a sale should be made subject to liens established or to be established, on references previously had or then pending before a master, a purchaser at such sale would not be heard, either in the trial or appellate court to dispute the validity of the liens thus established. This ruling was placed distinctly on the ground that by the very terms of the decree the purchaser was to take the chances of the allowance of all the claims then pending, and, therefore, their validity and extent

was a matter simply between the claimants and the parties to the mortgage; but the contingency now presented was foreshadowed in the opinion, for it says: "If the court had in the decree of sale reserved to the purchaser, although not a party to the proceedings, the right to appear and contest any alleged liens then under examination, and, therefore, not established by the court, an entirely different question would have been presented. But no such reservation was made; and the purchaser was required, without qualification, to take the property, upon confirmation of the sale, subject to the liens already established, or which might on pending references be established, as prior and superior to the liens of the first mortgage bondholders." The right of purchasers at a foreclosure sale to be heard on the question of compensation to trustees and others, both in the trial and appellate courts, was affirmed in *Williams v. Morgan*, 111 U. S. 684; 4 Sup. Ct. Rep'r, 638, when, as in that case, by the terms of the decree, the amount of such compensation placed an additional burden upon the purchasers. The case of *Swann v. Wright's Ex'r*, supra, was referred to in the opinion, and distinguished on the ground of the express provisions in the decree as to the terms of sale. See, also, *Stuart v. Gay*, 127 U. S. 518; 8 Sup. Ct. Rep'r, 1279; *Central Trust Co. v. Grant Locomotive Works*, 134 U. S. Deducible from these authorities, as applicable to the facts in this case, and supported by sound reasons, are the following propositions: First. A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions, thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. Secondly. Where not concluded by the terms of the decree, any subsequent rulings which determine in what securities of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court. In the case at bar, it is obvious that the amount of intervening claims to be subsequently allowed was a matter affecting the interests of the purchaser, and in terms reserved to him by the decree of sale. Supplementing and strengthening this right, re-

served and substantial, is the recital in the allowance of the appeal that the party purchasing is himself a bondholder, and trustee and representative of the other bondholders, which, if not conclusive as to the extent of interest in the litigation, is not to be ignored as wholly a matter of surplusage, but ought to be assumed as correct, and which is not to be disregarded simply because the evidences of that fact are not preserved in the record.

These conclusions compel an inquiry as to the validity of the adjudications in respect to the intervening claims. They were for the rental of rolling stock, and our examination must, therefore, proceed to the facts upon which the adjudications were made. This rolling stock was obtained by the railroad company, a consolidated corporation, from certain manufacturers, the appellees herein, on contracts of purchase. These in form were leases, but in substance, and properly so adjudged, were contracts of purchase reserving title in the vendors until after the payment of certain annual sums, called "rents," and with the right to retake possession on default in payment. Full payment of the purchase price was never made. The first bills under which the receiver was appointed were filed August 1, 1883, by a judgment creditor. The trustees in the several mortgages were made parties to these bills. They entered their appearance, and, neither objecting nor consenting, the receiver was appointed. Such receivership was continued four months, and until December 1, 1883, at which time bills were filed by the trustees for the foreclosure of their mortgages, and a receiver was appointed thereunder. The first inquiry presented is, whether rentals for such period were properly given priority over the mortgage debts. That question must be answered in the negative. It is important to note these facts:

First. This case is not embarrassed by any matter of surplus earnings; for it appears, beyond any possibility of doubt, that, from the time of the purchase of this rolling stock to the time of the final disposition of these cases the receipts did not equal the operating expenses. There was no diversion of the current earnings, either to the payment of interest, or the permanent improvement of the property. In fact, but little interest was ever paid on the bonds. *St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co.*, 125 U. S. 658, 673; 8 Sup. Ct. Rep'r, 1011.

Second. The receivership was at the instance of a judgment

creditor, and was with a view of reaching the surplus earnings for the satisfaction of his debt. It was not at the instance of mortgagees, nor were they seeking foreclosure of their mortgages. They were asking nothing at the hands of the court. They were not asking it to take charge of the property, or thus impliedly consenting to its management of the property for their benefit.

Third. This rolling stock was not included in the sale, but was returned to the intervenors upon orders entered prior to the decree of sale. So that only that property was sold which was covered by mortgages executed prior to any contract with the intervenors with respect to rolling stock, and it is the proceeds of this sale which the intervenors are seeking to appropriate. They cannot say that their property was sold, or that by such fact they have an interest in the proceeds of sale.

Fourth. The sale realized only a small proportion of the mortgage debts. There was no surplus above the mortgages for distribution to the intervenors, or among general creditors. In fact, only a small fraction of the mortgage debt was realized.

Fifth. During these four months, no demand for possession or rental was made of the receiver by any of the intervenors, or any one for them, with the single exception of what may be known as the "Grant" claims; and in respect to them the demand for possession was met by refusal on the part of the receiver, and a proposition for purchase at the unpaid portion of the purchase-price, which proposition was accepted by such intervenors, but never finally carried into effect. Upon these facts, we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can any thing be conceived which more

thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. *St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co.*, 125 U. S. 658-673; 8 Sup. Ct. Rep'r, 1011. So that these intervenors acquired no right of priority by virtue of their antecedent contracts of sale.

But it is urged, and with force, that the court did not allow contract price, but only rental; and the question is asked: "May a court, through its receiver, take possession of property, and pay no rental for it?" If it may legitimately compel the operation of the railroad in the hands of its receiver in order to discharge the obligations of the company to the public, may it not also, and must it not also, burden that receivership, and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries we have no doubt. A court which appoints a receiver acquires by virtue of that appointment certain rights, and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled

thereto, a court should appoint a receiver of property, the same being railroad property, and, therefore, under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself; and it is in reliance on this general proposition that the intervenors insist on an affirmance of the decree. But as against this we are confronted with these facts: The court never made any order for the rental of this rolling stock, and the situation of all the parties during this four months' receivership was this: The railroad company, with its franchises for building and operating a railroad, was, in equity, whatever may have been the location of the legal title, the owner of realty subject to certain fixed mortgage indebtedness, and of personalty, the rolling stock in question, subject to certain fixed liens. The creation, in the first instance, of those liens, gave to neither lien-holder, as against the other, priority in payment otherwise than in respect to the property specially charged with those liens. The holder of the lien on the real estate could not insist that both the real estate and the personalty should be subjected to the payment of his debt, before payment to the holder of the lien on the personalty of his claim, out of the proceeds of its sale. Neither, on the other hand, could the holder of the lien on the personalty insist that his lien should be first paid out of any proceeds of the realty. Each was limited to his priority of right on the property on which his lien rested.

Under those circumstances, neither the holder of the lien on the real or the personal property moving in the premises, a general creditor of the common debtor invoked for the payment of his debt the intervention of a court of equity, and the possession of all the property charged with these two liens, and its operation with a view to the collection of his unsecured claim. The operation of the road during that receivership did not pay the operating expenses. May the holder of a lien on the real estate insist that the deficiency be charged to the holder of the lien on the personalty, or that the latter shall become liable to the former for the rental of its property? Unquestionably not. Neither lien-holder asking the aid of the court, no obligation was assumed by either in respect to the management of the property as against the other.

If the operation of the property seized by the receiver did not result in the payment of the operating expenses, and the common debtor was unable to pay, the burden of the deficiency is as properly cast upon the holder of a lien upon the personalty as upon the holder of a lien upon the realty; and when the court, in the administration of the receivership, thereafter returns the personalty to the holder of the liens upon it, such lien-holder must be content to be relieved from any burden for a *pro rata* share of the deficiency, and has no equity to claim that he shall be not only thus relieved, but that he may also charge upon the realty, to the detriment of the lien-holder thereon, both the entire burden of the deficiency, and compensation to him for the use of his property. Hence, it follows that neither by reason of a contract of purchase of the rolling stock, nor by its use for four months at the instance of a general creditor, was any burden cast upon the holder of a lien upon the real estate for the non-payment of such contract-price or the rental value. The court, therefore, erred in charging rental value of the rolling stock during those four months as a prior lien upon the realty.

On the 1st of December, 1883, however, the situation was changed. At that time the mortgagees upon the realty commenced suits to foreclose their mortgages, and at their instance a receiver was appointed for all the property, both real and personal. In respect to the question here involved, the case is as though this was the commencement of judicial proceedings, and in that respect the attitude is this: The railroad company owned real and personal property, each subject to a separate lien. The holder of the lien upon the realty commences suit to foreclose its lien, and asks the court to take possession, through its receiver, of both the real and personal property. In the latter it had a remote interest, though subordinate to existing liens. The court, responding to its demands, takes possession of all the property, real and personal. Now, when the holder of a first lien upon the realty alone asks the court of chancery to take possession not only of the real, but also of personal property used for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of, and operated for the benefit of the realty, shall be paid in preference to its own claim. The proposi-

tion is a simple one. The application may not be a consent that the contract-price of the personalty shall be paid in preference to his lien, but it certainly is a consent that the rental value of that personalty during the time of the possession by the receiver appointed at his instance may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. But, either because he believed that the possession of the personalty was necessary for the operation of the railroad, and the security of his claim, or else because, by virtue of his secondary right, he expected to pay for the personalty, and retain both the personalty and the realty, he has had the court take possession of both by its receiver; and by that act, although subsequently the personalty was returned to the holder of the lien upon it, he consented to the payment of reasonable rental pending the receiver's possession. The conclusion is irresistible, that, under the circumstances, reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness. Indeed, we do not understand that counsel for appellant seriously contest this proposition. Their contention substantially is that the basis of such rental value was wrong; that the rental should only be on the basis of actual use — the "mileage system," as it is known in railroad parlance; that in fact the railroad company had acquired too much rolling stock, and, so averaging it, the mileage was quite small; whereas the master, as approved by the court, fixed the rental, not at actual mileage, but at a reasonable value irrespective of the actual use. We think that the decision of the court was right. The initiative in the matter was taken by the trustees. They asked by their bill that the court take possession of all the personalty. If more was taken possession of than was needed, it was their mistake.

The court is not to be assumed to be an experienced railroad manager, knowing exactly the amount of rolling stock needed for the operation of the road. It may justly assume that what had been contracted for was necessary; and, if the trustees ask that all may be taken possession of, it may act upon that as a declaration that all is necessary, and that rental value is to be paid for all. Theirs is the inquiry, and not the court's. It is a mistake

to suppose that their duties in respect to the foreclosure proceedings are formal merely, or limited to the employment of counsel and the handling of securities. They assume all the obligations of a party to the suit. They are charged with the care of the entire mortgage interest. They ask and receive large allowances for caring for that interest ; and it is a part of their duty to make examination, and become fully informed, in respect to the property, its liens, what is needed for its operation, and what can prudently and safely be dispensed with. Upon such information their application should be based.

It is true the court is not concluded by their representations, but its information is in the first instance derived therefrom, and it may and does generally act upon them ; and its action based on them must be held to be conclusive, so far as concerns the interest they represent, in respect to all liabilities and obligations flowing from the possession of a receiver. Whatever action the court may take thereafter, on information furnished by its receiver or by them, or otherwise, in respect to the property not primarily chargeable with their lien, its first action is the recognition of the validity of their application ; and the taking possession of all the property they name is in reliance upon their representation that all is needed for the operation of the railroad, and that they consent either to the payment of the unpaid purchase-price of any property thus taken possession of, or a reasonable rental for the use of the same. Consider for a moment the ordinary experience of railroad building, as developed in the story of this case. The franchise is acquired, the corporation organized, and a first mortgage placed upon the property, with the usual "after-acquired property" clause in it. The construction of the railroad proceeds. It is finished. Rolling stock is necessary, and the corporation acquires it under conditional contracts of purchase. The enterprise is a failure. The mortgage interest is unpaid. The trustee, discharging its duty, is bound to know that the rolling stock is held subject to the liens attending its purchase. It asks the court to take possession, not alone of the realty, but also of the rolling stock thus acquired and held. The application is not resisted. The court is ignorant of the history of the enterprise. It sustains the application, and appoints a receiver, and the rolling stock is taken possession of by that receiver. Can it be held that such possea-

sion, taken at the instance of the trustee, casts no burden on the road, either for purchase-price or rental prior to the claim of the original mortgage? Can the trustee forcibly, through the power of a court, compel an appropriation of this rolling stock for the benefit of the property subject to its lien without compensation? Does not its application for possession carry with it an assent that rental for such rolling stock shall be first paid, as one of the expenses of the receivership which it has invoked? But one answer can be made to this inquiry, and that is, that its application is a consent to the payment of reasonable rental during the possession of the receiver—a rental not based upon the use actually made by the receiver, but on the ordinary value of the rental of such property. So, although it may be true, as claimed by counsel, that more was taken possession of than was needed, and that there was only a limited use of each car and engine, yet the case is to be taken as though all were needed, and full use made of all; and that sum which would be reasonable rental value for such use should be paid. Such value is not to be determined by the amount of actual use, but by what in the first instance, and before the use had been had, would be adjudged a reasonable rental value. Upon such basis, no complaint can be made of the amount fixed by the court, reducing, as it did, the amount reported by the master.

These are the only matters which, by the exceptions filed to the master's report respecting rentals, were reserved for our consideration. Our conclusion, therefore, in the two cases, is that the decrees must be reversed, and the cases remanded with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent thereto.

Counsel for the Grant claims expressly stated in open court, in his argument, that, in case certain appeals from the sixth circuit were affirmed, there might result a double allowance to his clients, which they did not insist upon. As the details and sum are not clearly presented, we can only say that this matter must be taken into account in the subsequent disposition of the cases.

Reversed.

Bradley, J., dissents.

PENN GAS COAL CO. v. VERSAILLES FUEL GAS CO.

(19 Atl. B. 938; — Penn. St. —.)

1. EMINENT DOMAIN. RIGHT OF SUB-SURFACE PROPRIETOR. INJUNCTION. The plaintiff, a coal company, owned the coal beneath a tract of land with the right to remove all the coal without regard to the effect of such removal upon the surface. The defendant gas company sought to lay its pipes across the surface of the tract without compensation to the coal company. Held, that the effect of the entry by the defendant under the power of eminent domain was to take for the public use the right of subjacent support and that the plaintiff was entitled to an injunction to restrain such entry until compensation was made, unless the defendant would agree to be bound by the release of the right of support which the owner of the surface had made, or would give security for the payment of damages as required by law.

Marchand & Gaither and *M. Hampton Todd* for appellants.
Knox & Reed and *Moorhead & Head* for appellee.

WILLIAMS, J. The coal company is the owner of the coal under a large body of land in Westmoreland county, the surface of which belongs to others. In granting the coal, the owners of the land released their right to the support of the surface, so that the coal company has the right to remove all the coal without regard to the effect of such removal on the surface. The gas company desires to lay its main line for the transportation of natural gas, a fuel, upon and across these lands. The transportation of natural gas has been declared a public use, and the right of eminent domain conferred upon companies organized for the purpose of providing transportation for it by the act of 29th May, 1885. The gas company appears to have entered lawfully upon the surface for the purpose of laying its line of pipe, and to have proceeded on the theory that the owners of the underlying estate in the coal were not injured by their entry upon the surface, and had no right to be heard. The learned judge who heard the case adopted this view, and held that the gas company could not be required to give a bond to the coal company for going over the surface which did not belong to them, but nevertheless sustained the plaintiff's bill, and made a decree regulating the manner in which the pipes should be laid on the surface, so as to guard against injury to the underlying coal, as well as it was practicable to do.

Just how these positions are reconcilable, it might be difficult

to see. Our present inquiry relates to the first of them. If an entry had been made on these lands under the right of eminent domain before the coal had been separated from the surface by sale, the corporation making such entry would have acquired a right both to the surface and to the support of the surface by the underlying coal, or so much thereof as would be needed for that purpose. The loss in value to the tract by reason of the appropriation of part of the coal to the support of the surface is a proper subject for compensation by the viewers appointed to assess damages. *Searle v. Railroad Co.*, 38 Penn. St. 57; *Railroad Co. v. Balthaser*, 119 Penn. St. 472; 13 Atl. Rep'r, 294.

This is to be ascertained, not by a calculation of the quantity of the coal, but by the effect of the appropriation on the tract as a whole. "The railroad company," as was said by Lowrie, C. J., "gets no title to the coal further than it is needed to support the surface;" but they did acquire, beyond all questions, the right to such support, without which the right to the surface would have possessed but little value. It was, so to speak, appurtenant to the surface, and was acquired with it. What is the effect of the severance of the coal from the surface? If the sale of the coal be made in the usual manner, the purchaser takes it, subject to the burden of surface support, and cannot remove it without leaving a sufficient quantity to support the surface. *Jones v. Wagner*, 66 Penn. St. 429; *Carlin v. Chappel*, 101 Penn. St. 348. An entry in that case upon the surface has the same effect as though made before the sale of the coal, and the right to surface support residing in the owner of the surface passes to the corporation when it appropriates the surface. If, in addition to severing the coal from the surface by a sale, the owner releases his vendee and the underlying estate from the obligation of surface support, the release is binding upon him, and those taking title from him, but it cannot bind the state, or its grantee entering by virtue of the title paramount residing in the sovereign. The right of eminent domain cannot be abridged or defeated by the contracts between private owners, or by the release of the owner of the surface. An entry by the state upon the surface is an entry upon the subjacent strata, so far as they are necessary to support the surface for the purposes of the canal, railroad, pipeline or other structure to be built thereon. If the corporation

making the entry has no knowledge that the right of support has been released, or if it fails, for any reason, to tender a bond to the owner of the coal, the remedy of the owner is by bill to restrain, or by a proceeding to obtain an assessment of the damages sustained. If the latter mode be adopted, the amount of support needed, the probable length of time the structure may remain in place, the possible danger from its use, are elements that enter into the calculation of the damages to the extent that they may affect the market value of the underlying estate, but not otherwise. If the proceeding by bill be chosen, we see no reason why the owner of the subjacent stratum has not a right to require security to be given before the appropriation of his coal to the support of the surface is made by the corporation entering upon the surface for the construction of its railroad, canal or other line of transportation. As we have already said, the character of the structure to be put upon the surface, the use to which it is devoted, the depth below the surface at which the vein of coal is found, and the regularity of the geological formation, are circumstances to be taken into account in determining the amount of support needed, and of the compensation to which the coal-owner is entitled.

If the corporation feels that its works are of such a character, or of so temporary a nature, or for the transportation of a commodity so soon to be exhausted, as to render appropriation of the underlying estate to the support of the surface unnecessary, it may file a stipulation, agreeing to be bound by the release of the owner of the surface, and to accept the risk of subsidence which such release involves. If it does not do this, support is acquired, as matter of law, by an entry under the right of eminent domain, and is a proper subject for compensation, not by estimating the value of the coal in place that may be needed for support, but by the effect of the appropriation on the price or value of the underlying estate.

Upon the other question — that of the precautions necessary to be taken in laying the pipe so as to secure the coal owners from danger — the order made would seem, for the present at least, a sufficient protection. If it shall hereafter appear inadequate, there is no reason to doubt that such further order will be made as may then seem necessary. The only error of the court below was in

holding that the owners of the coal had no standing, and no right to be heard, on the question of compensation, because the pipe was not laid on their estate, but on the surface, which was owned by others. The court should have granted the injunction prayed for, unless the corporation joined in or agreed to be bound by the release of support by the owners of the surface, or gave security, as required by law, for the payment of the damages to be assessed for such support.

The decree is reversed so far as relates to this subject, and the learned judge is directed to proceed to a disposition of the motion for a preliminary injunction upon the principles now laid down, refusing it if either security or a release be given, and granting it if both be withheld.

The rule of this court is not to file an opinion in cases relating to preliminary injunctions. These cases are made an exception, because the question involved is new, and because it has seemed probable that an expression of our views at this time might simplify, if it did not wholly save, future litigation in them.

Eminent domain — support of road-bed.— It has been held that a railroad company, in condemning a right of way through a vein of coal underground, could not take less than a way for its road and so much of the coal and strata underneath as was necessary for its support. *DeCamp v. Hibernia Underground R. Co.*, 47 N. J. L. 48; S. C. affirmed, 47 N. J. L. 518, and see *Brown v. Corey*, 43 Penn. St. 495; *Matter of Hartford & Conn. Western R. Co.*, 65 How. Pr. 188.

CODY v. NEW YORK & N. E. R. Co.

(24 N. E. R. 402; 151 Mass. 462.)

1. CARRIERS OF PASSENGERS. COLLISION. CONTRIBUTORY NEGLIGENCE. Plaintiff was riding in a compartment-car, on one of the defendant's trains. Being aware from his knowledge of the movement of trains that there was serious danger of a collision, he went into the baggage compartment and stood by the door, prepared to jump, and did jump just before the collision which happened, and was injured. Held, that if the negligence of the defendant had placed him in a peril where jumping was a reasonable precaution, it was liable, even if the plaintiff might safely have retained his seat.

2. Held, also, that whether the plaintiff was guilty of contributory negligence in leaving his seat and going into the baggage compartment for the

purpose he did, was a question for the jury and judgment for the plaintiff was affirmed.

S. B. Allen for plaintiff. *H. E. Bolles, R. M. Saltonstall* and *R. D. Weston-Smith* for defendant.

DEVENS, J. It was admitted that the collision between the train on which the plaintiff was a passenger and another train, coming in the opposite direction, occurred through the negligence of defendant's servants. The question for the jury was only whether the plaintiff was himself in the exercise of due care, or was guilty of negligence which contributed to his injury. The plaintiff had taken his seat in that portion of the compartment-car, used also for the baggage, which was appropriated to smokers, and was reading his paper when the train started. He did not at first notice that the train had commenced its journey, but after it was fairly under way observed it, and was aware, from his knowledge of the time of the trains, that it was in serious danger of a collision, which might occur at any moment. He threw down his cigar, passed into the baggage portion of the compartment-car, stood at the door with his hand upon the knob prepared to jump, and did jump just before the two trains collided. If a passenger is in so dangerous a situation, by reason of the peril arising from an accident, for the occurrence of which those who undertake to transport him are responsible, as to render his jumping a reasonable precaution, and is injured thereby, they are answerable to him in damages, even if he might safely have retained his seat. *Ingalls v. Bills*, 9 Metc. 1; *Sears v. Dennis*, 105 Mass. 310; *Worthen v. Railway Co.*, 125 Mass. 99; *Linneka v. Sampson*, 126 Mass. 506.

It is the contention of the defendant that the action of the plaintiff, in going into the baggage compartment, shows a lack of due care on his part which should prevent him from maintaining this action; that he was wrongfully there, without any justifying emergency; and thus that he assumed all the risks incident thereto. *Bates v. Railroad Co.*, 147 Mass. 255, 265; 17 N. E. Rep'r, 633. The plaintiff did not go into the baggage compartment for the purpose of being there transported, but in order to do something to save himself if a collision occurred. He was accustomed to the management of railroads, had often worked upon them, and

might expect that he could, with a reasonable chance of safety, leap from the train when collision was imminent. The defendant urges that as by his own admissions it appears that plaintiff knew that the place he assumed was more dangerous than that he left, and that the rear car was the safest place in the train, these facts are conclusive that the plaintiff was negligent in going there. No such conclusion follows. The place where he sat and the rear car were safer if plaintiff proposed to do nothing to extricate himself from the peril in which the defendant had placed him. He could not in either place ascertain when the collision would take place, and could there only abide the shock. Nor could he get to the end of the rear car without danger. He could not tell when the collision would occur. It might be that he would be thrown down in passing from one car to the other, or in walking along the alley of the car with his back to the engine, when he would be in most serious danger. Even if all the passengers in the two cars who remained in their seats in ignorance of the impending danger, had escaped without injury, it would not be conclusive that the plaintiff was guilty of negligence in going into the baggage-car, or had recklessly or unwisely misjudged what was prudent for him to attempt. *Buel v. Railroad Co.*, 31 N. Y. 314, 318.

The prudence of the plaintiff's conduct is not necessarily to be tested by the results of the accident to others in a different position. Even if it were, as the case reported shows that serious injury did result to those who were sitting or moving in those parts of the train appropriated to passengers, it is entirely possible that plaintiff would have sustained more serious injury if he had remained in his seat, or had attempted to reach the end of the rear car, than he did by his action. The question whether the plaintiff acted with due and reasonable care, under all the circumstances, was one peculiarly for the jury, and was submitted under proper instructions.

Exceptions overruled.

See note to *Buchanan v. West Jersey R. Co.*, 1 Am. R. R. & Corp. Rep. 686.

CHICAGO CITY RY. CO. v. PELLETIER.

(24 N. E. R. 770; — Ill. —.)

1. HORSE RAILROADS. EJECTING PASSENGER. INSTRUCTIONS. Plaintiff sued for being forcibly ejected from defendant's car. The defense was that the plaintiff refused to pay his fare and used indecent and abusive language. Among other things the court instructed the jury in effect that though the plaintiff did not pay his fare, yet if the defendant's servants threw him off while the car was in motion, without warning and with unnecessary violence, the defendant would be liable. Held, the instruction was correct.

2. CONDUCT OF PASSENGER JUSTIFYING EXPULSION. The mere fact that a passenger uses vulgar or abusive language so as to attract the attention of other passengers and refuses to desist upon request, will not justify his removal. His conduct should be such as is calculated to annoy and disturb his fellow-passengers.

C. M. Hardy for appellant. *F. W. Tourtellotte* for appellee.

BAKER, J. This was an action by appellee against appellant, in the superior court of Cook county, to recover for personal injuries, alleged to have been received by appellee by being forcibly ejected from the cars of appellant, and thrown violently upon the ground, and under the feet of a horse, etc. A trial resulted in a verdict for appellee, assessing his damages at \$2,500. Motion for a new trial was overruled, and judgment was rendered on the verdict, which judgment, on appeal to the appellate court, was affirmed, and the railway company prosecutes this further appeal.

The general issue was filed, and a plea justifying putting appellee from the cars, etc., which set up the rules of the company to collect fare from each passenger, and requiring the conductors not to allow any indecent language or improper conduct on appellant's cars; and if any passenger should behave with gross impropriety, or refuse to pay fare, the conductor should stop the car and eject the passenger, using no more force than was necessary; and alleging that the appellant, when, etc., refused to pay fare, and became abusive, employed profane and indecent language, and behaved otherwise with gross impropriety; that the car was filled with passengers, etc., and the conductor, while the car was standing, gently laid his hands upon him, and removed him, etc., using no more force than was necessary, as he lawfully might. Issue was taken upon this plea of justification, and it was upon it that

the case was mainly contested. Looking into the evidence we find that there is a sharp conflict; and the jury would have been warranted in finding either that appellee paid his fare, or refused to do so, or that he was guilty of gross impropriety, to the disturbance and annoyance of passengers on the car, or that he was not, as they gave credence to the witnesses upon the one side or the other. In this state of case three instructions were given upon each side, of which no complaint is made, except as hereinafter stated. The law bearing upon the issues was given with substantial accuracy.

Appellant, however, insists that the court erred in giving the first instruction in the series for appellee. It was as follows: "(1) The jury are instructed that, even if the jury believe from the evidence that the plaintiff did not pay his fare, or some one pay it for him, when riding on the defendant's car, and the conductor of the said defendant's car, then in charge of the car, did not undertake to remove him in a peaceable manner, using no more force than was necessary, but pushed or threw him off the car while the car was in motion, and without any immediate warning, and he was injured thereby, then the defendant is liable for such injury and damage." The criticism made is that the instruction ignored the right of the conductor to eject appellee from the car for such misconduct as would disturb other passengers that the company were required to protect. The instruction was not directed to the right to eject appellee, but to the manner of doing it; and it could not have been understood as excluding from the jury a consideration of the testimony tending to show misconduct on his part. Other instructions told the jury that the conductor would be justified in putting appellee off the car for using vulgar and indecent language in a voice loud enough to annoy or disturb other passengers. While this would be true, the law would not justify unreasonable and excessive force, or permit his removal from the car at a place or under circumstances dangerous to his life or limb. The instruction complained of went only to that branch of the case, and correctly stated the law.

It also urged that the court erred in modifying appellant's second instruction. This instruction told the jury that, although appellee may have paid his fare, and the conductor was mistaken about it, yet, if, during the discussion, appellee used vulgar lan-

guage in a tone of voice sufficiently loud to attract the attention of the passengers, and refused to cease the use of such language, then the conductor was justified, etc., in putting him off. The court inserted after the word "passengers" the words "to annoy and disturb them," so that, as given, the instruction read that, if he used such language in a voice sufficiently loud "to attract the attention of the passengers, and to annoy and disturb them," and refused to desist, etc., the conductor would be justified, etc. The modification was not improper. It seems to be contended that the fact that the attention of the passengers, or any number of them, was attracted by the language, whether it was calculated to annoy or disturb them or not, would justify the ejection of a passenger. Such is not the rule. Railway companies are not conservators of the public or of private morals. They may, and should, in all cases adopt and enforce such reasonable rules as will protect their passengers from injury, insult, disturbance or annoyance. Naturally such rules for the protection of the passenger from the results of the conduct of others fall into two classes: those which relate to the safety of the passenger, and those that pertain to his comfort and convenience. Unquestionably any conduct or any violation of a reasonable police regulation of the road, which tends to endanger the life or limb of the passenger, or in any wise put him or his property in jeopardy, may be met with such prompt action as the necessity of the case seems to require to prevent the threatened harm. The servants of the company would in such case not be required to wait, or justified in waiting, until injury was inflicted. In respect of regulations relating to the comfort and convenience of the passenger a different rule prevails. However strongly the use of indecent language in a public conveyance should be condemned, it is apparent that the use of such language, attracting a few persons on the rear platform or seat, might create neither annoyance nor disturbance; while the same language used at other times, in the presence of others or under different circumstances, would be highly offensive and justly subject the passenger who persists in using the same to ejection from the car. In such case the right of the company arises from its duty to protect its passengers from annoyance and discomfort; and, undoubtedly, the use of profane, vulgar and indecent language, having naturally the tendency to offend and annoy other passengers upon the car,

would form sufficient justification for the conductor to stop this car and require the person offending to leave; and, upon his refusal to cease its use or leave the car, to eject him. The modification was not error; and, while the instruction might very properly have been further modified by inserting the proposition that, if appellee used the language imputed to him, in a manner that naturally tended, under the circumstances shown, to annoy or disturb other passengers, and refused to desist upon request, etc., the conductor might lawfully put him off the car, using no more force than was reasonably necessary, and having due regard to his safety from injury, yet the instruction as given, in view of the facts, was not improper.

It is also said that error intervened in consequence of the remarks of appellee's counsel to the jury. While the remarks were clearly improper, they were met by the court promptly telling the jury they must disregard them, and the court, also, by an instruction, pointedly told them their duty in that regard. The court did all in its power to correct the breach of the rule which requires that counsel shall, in argument, keep within the record, except to award a new trial or punish the attorney for contempt. We are not prepared to say that, considering the circumstances shown in the record, the jury were or could have been influenced by the remarks of counsel complained of. We find no substantial error in the record. The jury having found for appellee, and that finding having been approved by both the trial and appellate courts, must stand. The judgment of the appellate court is affirmed.

Ejecting passenger. — In *Murphy v. Union Ry. Co.*, 118 Mass. 228, it was held that it could not be pronounced negligence as a matter of law for the defendant to eject a passenger from a horse car while in motion but that the question was one for the jury. But the carrier is generally held liable for the consequences of ejecting a passenger from a car while the same is in motion. *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 848; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 28; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; *Pennsylvania R. Co. v. Vandever*, 42 Penn. St. 865; *Kline v. Central Pacific R. Co.*, 37 Cal. 400; *Meyer v. Pacific R. Co.*, 40 Mo. 151.

FURNISH V. MISSOURI PAC. RY. CO.

(13 S. W. R. 1044; — Mo. —.)

1. RAILROAD COMPANIES. DEGREE OF CARE TO BE EXERCISED FOR THE SAFETY OF PASSENGERS. It is the duty of railroad companies to their passengers to exercise the highest practical care, which capable and faithful railroad men would take, in like circumstances, to provide a track, rolling stock and service reasonably fit and sufficient to safely perform the contract of transportation.

2. SHIFTING THE BURDEN OF PROOF. The derailment of a train of cars is *prima facie* evidence of negligence on the part of the railroad company, and devolves upon the company the burden of showing that such derailment was not in consequence of any negligence on the part of the company.

3. INSTRUCTIONS. The instructions given and refused are set forth at length in the statement of the case and the action of the trial court thereon is approved.

4. EXCESSIVE DAMAGES. The plaintiff was a woman fifty-three years of age. She was injured in the back though not externally. She had not been able to walk since the accident and had suffered pain intermittently. The probabilities were that she would be better but would never fully recover. A verdict for \$15,000, was held excessive and a new trial was ordered unless plaintiff would remit \$5,000.

THIS was an action brought by Martha A. Furnish, being joined therein by her husband, to recover of defendant damages for injuries sustained by her while a passenger on one of defendant's cars. It appeared in evidence that on the 6th of February, 1886, she took passage on an accommodation train, consisting of a locomotive and a tender, a baggage-car, and two passenger-coaches, at Independence, Mo., intending to go to Kansas City. When the train arrived within a mile and a half of Kansas City the locomotive and all the cars left the track on an embankment, and, after leaving the rails, the train tipped over and rested on its side. The plaintiff introduced evidence tending to prove that at the point where the locomotive left the track a number of ties were broken off and splintered (some of them were decayed and rotten), and that the tire of one of the drive-wheels, which had been placed thereon shortly before the accident, was three-eighths of an inch thicker than the one upon the companion drive-wheel, and that the difference in thickness had been called to the attention of defendant's assistant master mechanic, while the locomotive was in the repair shop, shortly before the

accident. The effect of this difference was to make one drive-wheel larger than the other. There was evidence that the south rail at the point where the locomotive left the track was bent inwardly towards the north rail. Defendant introduced evidence tending to show that the ties, at the point where the train left the track, were sound ties, capable of holding the spikes; that the track at that point had been inspected daily for a long time; that it had been inspected two hours before the accident occurred; and that there was nothing to indicate any defect in the track or road-bed. Defendant also gave evidence tending to prove that the engine was inspected by the engineer immediately before it left Independence on that trip, and it was found in perfect condition as far as he could discover. The master mechanic, assistant master mechanic and engineer of defendant all testified that the difference in the thickness of the tire would have no effect upon the safety of the locomotive, nor any tendency to throw it from the track. The assistant master mechanic denied that his attention had been called to the difference in the thickness of the tire by the witness who testified he had done so, and further testified that the latter had nothing to do with the engine when it was in the shop for repairs. Plaintiff's evidence as to her injuries was that after the car in which she was riding was derailed, she was found lying in the top of the car, with her feet through a window, and a cushion across face. She was taken out of the wreck, and placed upon some cushions, and afterward removed to an hotel in Kansas City, where she remained for twenty-five days. She was examined by a physician the afternoon of the accident. He testified that he found a great deal of tenderness in the small of the back, increased pain upon pressure, radiating from several inches around the point of injury, with increased sensibility of the limbs, and that she was suffering a great deal from the fall. At that time there was no external evidence of an injury, but in a day or two afterward there was some discoloration along the back and side. After her return home he saw her several times, and found her but little improved. The evidence of her family physician was to the effect that he had known and prescribed for her since 1879; considered her in delicate health for two or three years from that time, and up to within two years she had had attacks of neuralgia, often complaining of her back, but for eighteen months

prior to her injury he had not prescribed for her; that her injuries had rendered her an invalid, unable to walk or attend to any of her household duties; and that he believed she would be unable to walk for a long period. On cross-examination he testified that in his opinion her spinal cord was not injured by the accident; that she had no indications of paralysis; and that she would probably in time recover so as to get around, but would, in all probability, always have a weak back. Another physician, called as an expert, testified that he had seen her twice — the first time in April, 1886, and the second time a week before the trial; that in some respects she had improved, in others not; that he believed her injuries were permanent, but that the probabilities were that she would get better; that she had got better. Testimony was given by non-professional witnesses that she had not been able to walk prior to the trial.

At the close of the evidence the court, of its own motion, gave the following instructions to the jury, without objection or exception by either party, viz.: "(a) If the jury believe from the evidence that, at the time said train was overturned, the employees of defendant were exercising, and had exercised, the highest practicable care, caution and diligence, which capable and faithful railroad men would exercise under similar circumstances, and that the train ran off, or was thrown from, the track, and was overturned by causes or a cause unknown to the defendant, its agents and servants, and which could not have been discovered by them, and the causes or cause of the accident removed or counteracted by the exercise of the aforesaid care, caution and diligence, then the plaintiffs cannot recover in this action, and the verdict should be for the defendant. (b) The jury are instructed that although they may believe from the evidence that some of defendant's ties on its road-bed were decayed or rotten, as described by some of plaintiffs' witnesses, yet they should not find a verdict for plaintiffs on this ground if they believe from the evidence that such condition of said ties did not cause the train to be thrown from the track, and plaintiff, Martha A. Furnish, to be injured, as complained of in the petition. (c) The court instructs the jury that although they may believe from the evidence that one of the drive-wheels of the locomotive, which was hauling the train in question, had been re-tired, and that the new tire had not been turned down,

yet they cannot find for plaintiffs on this ground, unless it appears from the evidence that it was necessary to have the same turned down, to render it fit and proper to be used to avoid accident; nor can they find for plaintiffs on this ground if it appears from the evidence that the injury complained of did not result from defendant's failure to have said tire turned down.

Furthermore the following instructions were given at the instance of plaintiff, viz.: "(d) The court instructs the jury that if they believe from the evidence that the defendant corporation was engaged in the business of transporting passengers for hire upon a railroad operated by it, then the law denominates the defendant a common carrier; and it was bound to provide a reasonably safe track and road-bed, and reasonably safe and staunch road, worthy cars and engines, and careful employes to manage the same, so far as human skill, diligence and foresight could provide; and is responsible for all injuries resulting from slight negligence on the part of itself, its agents or servants.

If, therefore, the jury believe from the evidence that on or about the 6th day of February, 1886, the plaintiff, Martha A. Furnish, took passage on the cars of the defendant, and that said car, while said Martha A. Furnish was a passenger thereon, ran off the track of defendant's railroad, and fell down the embankment thereof, and the plaintiff, Martha A. Furnish, without fault or negligence on her part, was thereby injured, then it rests on the defendant to prove to your satisfaction that said car, the engine drawing the same, the machinery by which it was operated, and the road-bed, track and ties of the road, at the place of derailment, were reasonably safe and sound, so far as human skill, diligence and foresight could provide, and that said accident was caused by inevitable accident or defects in said car, engine, machinery, road-bed, track and ties that could not have been seen, detected or known to the defendant, its agents or servants, by the exercise of the utmost human skill, diligence and foresight. (e) The court instructs the jury that if they believe from the evidence that on or about the 6th day of February, 1886, the defendant was engaged in the business of transporting passengers in the state of Missouri, and that on said day the plaintiff, Martha A. Furnish, was received by it, to be carried as a passenger on one of its said cars, and that while being so transported on said car she was in-

jured by reason of said car leaving the track and falling down an embankment of defendant's railroad, then the burden rests upon the defendant to prove to the satisfaction of the jury that said derailment was caused by inevitable accident, and not from any defect or imperfection in said car or the engine by which it was drawn, or the machinery by which it was operated, or in the road-bed, track or ties of the defendant's road, which could have been prevented by the exercise of the utmost human skill, diligence and foresight, and to prove that the injury could not have been prevented by the exercise of the utmost human skill, diligence and foresight; and unless the jury so believe they will find for the plaintiffs. By the utmost human skill, diligence and foresight is meant such skill, diligence and foresight as is exercised by a very cautious person under like circumstances. (f) If the jury should find for the plaintiffs, they will assess Martha A. Furnish's damages at such sum as they may believe from the evidence will compensate her, the said Martha A. Furnish, for her injuries, including all bodily pain and mental anguish they may believe from the evidence she has suffered, and will necessarily and inevitably suffer, and any permanent injury or incapacity they may believe from the evidence she has sustained; and it will be proper for the jury to consider also the effect of the injury upon plaintiff Martha A. Furnish's health in the future, if they believe from the evidence her future health will be affected by the injury, and all damages, present and future, which from the evidence they believe to be the necessary result of the injury complained of, not exceeding the sum of \$25,000."

The instructions given in behalf of defendant were these, viz. :
“(g) The court instructs the jury that the defendant, as a common carrier of passengers over its railroad in its cars, did not undertake to insure or absolutely guarantee the safety of Martha A. Furnish, and the defendant was not bound to have its road-bed or tracks, ties, cars, engine and machinery absolutely safe; nor did the law require the defendant to adopt every precaution to prevent Martha A. Furnish from being injured, and the persons in charge of defendant's train and railroad were only required to use that degree of care which prudent railroad men would exercise under like circumstances, with no knowledge that an accident was to happen. (h) The court instructs the jury that there is no evi-

dence in this case tending to show that any part of the car in which plaintiff Martha A. Furnish was riding at the time of the injury was defectively or improperly constructed. (i) The jury are instructed that if they find for the plaintiff, they can only find such damage as Martha A. Furnish has sustained as the natural and reasonable result of the injury she received at the time of the accident; and these must be only compensatory. In this case punitive or exemplary damages cannot be allowed by the jury." "(k) The jury are instructed that if they find for the plaintiff, they must not allow any present damages for her alleged permanent injury, or for apprehended future consequences of the injury received by the accident in question, unless they believe from a preponderance of evidence that there is such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. It is not enough that the injury received may develop into more serious consequences or conditions than those which were visible at the time of the injury or at the present time, or even that they are likely to develop consequences contingent, speculative or merely possible, which are not proper to be considered by the jury in ascertaining the damages. (l) The jury are instructed that the merely possible, or even probable, continuance of plaintiff's (Martha A. Furnish's) disability or injuries received at the time of the accident is not an element of damages in this case. To justify them in assessing damages for future or permanent disability or injury, it must appear by a preponderance of the evidence in the case that continuous or permanent disability is reasonably certain to result from such injuries. Consequences which are speculative or contingent cannot be taken into consideration by the jury in arriving at the verdict. It is not enough that plaintiff's (Martha A. Furnish's) injuries which she then received may develop into a condition more serious than they are at present or may continue; but the jury must be satisfied from a preponderance of the evidence that they will so result or continue.

The instructions offered by defendant and refused by the court were as follows, viz.: "(1) The jury are instructed that under the pleadings and evidence in this case the plaintiff cannot recover, and you will find for the defendant. (2) Although the jury may believe that the train in which Martha A. Furnish was riding was

overturned by some defect in defendant's road-bed, track, ties, cars, engine or machinery, yet they will find for the defendant, unless they further find from a preponderance of the evidence that the defendant's employes knew of such defect, or by the exercise of reasonable skill and diligence could have discovered such defect. (3) If the jury believe from the evidence that at the time said train was overturned the employes of the defendant were exercising, and had exercised, the highest practical diligence which capable and faithful railroad men would exercise under similar circumstances, and that the said train was thrown or ran off the track, and was overturned by causes which were unknown to the defendant, and which could not have been known to the defendant by the exercise of reasonable care and caution, skill and diligence, then plaintiff cannot recover in this action, and the finding must be for the defendant. (4) The jury are instructed that, although they may believe from the evidence that some of defendant's ties of its road-bed were decayed or rotten, as described by some of plaintiffs' witnesses, yet before they can find a verdict for plaintiffs on this ground they must believe from a preponderance of the evidence that such condition caused the train to be thrown from the track, by which plaintiff suffered the injury complained of. (5) The jury are instructed that, although they may believe that one of the drive-wheels of the locomotive which was hauling the train in question had been re-tired, and that the new tire had not been turned down, before they can find a verdict for the plaintiff on this ground they must believe from a preponderance of evidence that it was necessary to have the same turned down to render it fit and proper to be used so as to avoid accident, and they must further believe that the defendant's failure to have the same turned down did cause the injury complained of; and in this connection the jury are further instructed that if they believe that Mr. New, master mechanic of defendant, was a skillful, experienced mechanic, familiar with the construction and repair of locomotive engines, defendant had a right to rely upon his judgment and his decisions thereunder as to the necessity of turning down the tire of said drive-wheel, and the defendant is not liable for any error of judgment of said New in that regard."

Under the instructions and evidence the jury found a verdict for plaintiffs for \$15,000, and judgment was rendered thereon,

from which the defendant appealed, in due course, after the proper motions and exceptions.

T. J. Portis, Robt. Adams and T. B. Buckner for appellant.
Gates & Wallace for respondents.

BARCLAY, J. (after stating the facts as above). It is conceded by defendant that the case made by plaintiff entitled her to its submission to the jury, and no question of her contributory negligence was raised at any time. The exceptions now urged are only those bearing on the correctness of the instructions and on the amount of plaintiff's damages.

1. Defendant's chief objection is to the rulings of the trial court marking the degree of care to be maintained by it as a carrier of passengers. It should first be noted that the instruction given (of its own motion) by the court defined the care required of defendant toward passengers as the "highest practicable care, caution and diligence which capable and faithful railroad men would exercise under similar circumstances." This instruction was given without objection from any quarter, and, therefore, must be accepted as the law for the case in hand, without regard to its correctness or incorrectness in the abstract; and, since it states the rule substantially as laid down in the other instructions, there is serious doubt whether defendant is in position to question the latter now. But we do not deem it necessary to dispose of the question upon any such narrow ground of practice. Being satisfied of the soundness of the rulings of the trial court on this subject, we think it opportune to consider them from a stand-point of wider range. Throughout the instructions it is asserted that the duty owing by a steam-railway carrier to its passengers is to furnish reasonably safe and sufficient road-bed, track, cars and engine "so far as human skill, diligence and foresight could provide," and that defendant "is responsible for all injuries resulting from slight negligence" on its part. In another part of them the import of the words "utmost human skill, diligence and foresight," as used by the court, is explained to be "such skill, diligence and foresight as is exercised by a very cautious person under like circumstances." This is substantially and almost literally the same language as is approved by text-writers of high authority in summarizing the law deducible from all the precedents. Story Bailm.,

§ 601; 2 Greenl. Ev., § 221; 2 Kent Comm. 601. The court also told the jury that the defendant, as a common carrier of passengers did not undertake to insure the safety of plaintiff. Taking the declarations of law together, we think they stated the obligations of defendant to plaintiff as its passenger with great accuracy.

To exercise the highest practical care which capable and faithful railroad men would take, in like circumstances, to provide a track, rolling stock and service reasonably fit and sufficient to safely perform the contract of transportation into which the carrier has entered, is the measure of defendant's legal duty in such cases. That rule does not rest upon any artificial or technical division of negligence into grades or classes, but springs naturally from an application to such facts of the general principle that a man of ordinary prudence is required to exercise a care proportionate to the risks he assumes in the business he has in hand. Where he undertakes a risk involving safety of life and limb to those with whom he deals, he is charged with a care proportionate to the peril. When a passenger commits his person to a carrier for hire for transportation by railroad over rivers, across mountains, through cities, in the night (it may be while asleep), at a speed expressive of the progress of the age in which we live, he may justly demand the exercise of such care on the part of the carrier against disaster as in the nature of things such undertaking would imply. That degree of care has generally been defined in language such as was used in the instructions before us. It has been repeatedly approved by many courts, and we consider this rule so well established in our jurisprudence as to require no further argument to support it. *Leslie v. Railroad Co.*, 88 Mo. 50; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *White v. Railroad Co.*, 136 Mass. 321; *Railroad Co. v. Anderson*, 94 Penn. St. 351; *Caldwell v. Steamboat Co.*, 47 N. Y. 282. As stated above, we do not consider it in conflict with the ruling here in *Dougherty v. Railroad Co.*; 8 S. W. Rep'r, 900. The instructions of the court go no further than to declare this rule in various forms of expression, the meaning of which, taken as a whole, is unmistakable. Irrespective of any question of the burden of proof, there was, in the present action, abundant evidence to justify the inference that the injury to plaintiff resulted from a derailment of the cars, occa-

sioned by the giving way of rotten and unsafe ties in the road-bed at the place of the accident. That such a defect in the road-way could have been discovered by a proper discharge of defendant's duty of inspection in time to avert the calamity the evidence strongly tended to show. That duty was an essential part of defendant's obligation toward its passengers, and it was chargeable in its performance with any omission of the "highest practicable care of capable and faithful railroad men" (in the language of the court) in the circumstances. *Miller v. Steamship Co.*, 118 N. Y. 200; 23 N. E. Rep'r, 462.

2. Regarding the instruction marked "d," placing the burden of proof upon defendant to show that the injury did not occur through any omission to discharge its legal duty in the premises, it should be remarked that the same instruction first required plaintiff to establish that the car in which he was a passenger "ran off the track of defendant's railroad, and fell down the embankment thereof," and that he was thereby injured. Thus framed, the instruction correctly expressed the law on the subject. The mere injury of plaintiff while a passenger did not call for explanation or proof from defendant. It first devolved on plaintiff to show some fact with reference to it from which negligence on defendant's part as a carrier might be fairly inferred. Here it was shown that the car ran off the track and over the embankment. The condition of the road-way at that point warranted the inference that the injury was occasioned thereby. In that state of the case, if the jury found that plaintiff had been injured by the derailment of the car and its fall down the embankment, it then devolved on defendant to explain how these things occurred without breach of its duty to plaintiff as a carrier. This is what the court said in effect, and it committed no error in so doing. *Hipsley v. Railroad Co.*, 27 Am. & Eng. R. Cas. 287, and 88 Mo. 348; *Breen v. Railroad Co.*, 109 N. Y. 297; 16 N. E. Rep'r, 60; *Seybolt v. Railroad Co.*, 95 N. Y. 562. It may not be entirely in accord with technical nicety to instruct that the burden of proof shifts to defendant in the course of such a trial. It might be more accurate to say (in proper form, for the purposes of a jury trial) that the facts of the derailment of the car, and of plaintiff's injury thereby, make out a *prima facie* case of defendant's negligence which, unexplained, would justify a recovery; but in the

ordinary course of administering law it has become usual to declare that on a certain showing by plaintiff in such cases, the burden of proof then rests on defendant to prove that it has not been negligent. We are not prepared to condemn that form of expression at this day, in view of our statute to the effect that in all proceedings we should regard substance rather than form (R. S. 1879, § 3586), and should not reverse for any error not affecting the substantial rights of the adverse party (R. S. 1879, § 3569).

3. Defendant's next contention is that the court erred in refusing certain instructions requested by it. They are recited in the statement accompanying this opinion. We will consider them separately: That numbered 1 declared that the plaintiff could not recover on the evidence. It is not argued here. Obviously there is nothing in the exception to its refusal. That numbered 2 is defective in holding defendant to the "exercise of reasonable skill and diligence" only. In view of what we have already said above, it is unnecessary to comment further upon it. That numbered 3 is almost literally the same as that marked "a," given by the court of its own motion, except that the words "aforesaid care" are substituted by the court for "reasonable care." As the instruction "a" was not objected or excepted to, it is difficult to see how defendant can now avail itself of the refusal in question. But, irrespective of that, we think the change made by the court was proper to bring the instruction into harmony with itself. Without that modification two different degrees of care would have been stated in the same declaration of law as measuring defendant's liability. The court adopted the first one, as defined by defendant, and brought the rest of the instruction into consistency with it. To this defendant took no exception, and is now concluded by the action of the trial court in that regard. No point has been made in this court in any way upon the refusal of instructions numbered 4 and 5, as asked by defendant. There is, hence, no need to consider them. The court, in the instructions marked "b" and "c" (unexcepted to) gave to the jury as much of the requests referred to as the law warranted.

4. No complaint is entered against the instructions fixing the measure of damages; but it is earnestly insisted that the assessment by the jury of plaintiff's compensation of \$15,000 is excessive. We have no hesitation in setting aside a verdict when

clearly satisfied that the evidence does not support the assessment of damages, as in other instances of failure of proof. But many cases arise in which, at this distance from the trial court-room, we feel ourselves disposed to defer to the action of the circuit judge on this point, and to resolve any reasonable doubts on the subject in favor of the correctness of his ruling approving the find. The trial court should, on motion, fearlessly and willingly reduce any verdict to its proper amount when the weight of the evidence indicates it as excessive. He has the advantage of forming his opinions from the living realities before him, and the impressions so obtained are far more reliable than those given by any transcript of the record on appeal. We, therefore, give great weight to his rulings on the matters depending on the credibility of witnesses, on the physical appearances of parties, and the like. It is, therefore, of the most importance in the administration of justice that he should act firmly and promptly on such subjects, and apply a proper corrective to any unwarranted findings thereon by juries. The cases in which we can properly interfere are exceptional, and only such as imperatively require it to prevent a total and obvious failure of justice. In the case before us there is evidence that the plaintiff is probably crippled for life, owing to the injury of her spinal cord; that she suffers pain intermittently; that she was not able to walk before or at time of the trial; was fifty-three years of age, and had left her house but once since the accident; that she was then carried out for fresh air, but was so pained that she did not go out again. She was examined at various times by several eminent physicians, among them by Dr. King, of Sedalia, one of the leading surgeons of the defendant; but defendant did not give the jury the benefit of Dr. King's observations of the case. The plaintiff's injuries are of such nature and extent that we are not prepared to say the damages awarded for them are excessive. Certainly they are not sufficiently so to warrant us in reversing the verdict or reducing it, in view of our uniform rulings as to the proper occasions for such interference. Approved precedents have sanctioned many larger findings in cases of serious injuries of somewhat similar character. *Harrold v. Railroad Co.*, 24 Hun, 184; *Railroad Co. v. Holland*, 18 Ill. App. 418; affirmed, 122 Ill. 461; 13 N. E. Rep'r, 145; *Woodbury v. Dist. Columbia*, 5 Mackey, 127.

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The exceptions urged to the judgment pronounced by the trial court we find untenable. It is, therefore, affirmed conditionally as indorsed hereon by the court; that is, on condition that the plaintiff remit \$5,000 of the judgment within thirty days, otherwise the cause will be reversed and remanded because of excessive damages.

All concur except as to the remarks on the question of excessive damages.

Presumption of negligence from derailment.—See *Arkansas Midland R. Co. v. Canman* and note, ante, p. 811.

McCALL V. PEOPLE OF THE STATE OF CALIFORNIA.

(10 Sup. Ct. R. 881; 136 U. S. 104.)

1. **CONSTITUTIONAL LAW. INTERSTATE COMMERCE. TAXATION.** An ordinance of the city and county of San Francisco imposing a license tax upon the agent of a railroad company, who is engaged in soliciting passenger traffic over a railroad operated between Chicago and New York, is unconstitutional and void because such agent is engaged in the business of interstate commerce.

2. **COMMERCE BEYOND THE STATE.** The fact that the road in question is wholly without the state of California is immaterial. A state can no more tax interstate commerce wholly without its limits than it can a commerce passing into or through it.

3. **WHAT IS INTERSTATE COMMERCE.** Soliciting passengers in San Francisco to be transported from Chicago to New York is directly and not remotely or incidentally connected with interstate commerce.

Jos. P. Kelly for plaintiff in error. *Jas. D. Page* for defendant in error.

LAMAR, J. Order No. 1589 of the board of supervisors of the city and county of San Francisco "imposing municipal licenses," provides, among other things, as follows: "Section 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not more than one thousand dollars, or by imprisonment no more than six months, or by both," "Sec. 10. The rates of license shall be according to the following schedule:" "Subdivision 33. First. For every railroad agency, twenty-five dollars per quarter."

The plaintiff in error, J. G. McCall, was an agent in the city and county of San Francisco, Cal., for the New York, Lake Erie and Western Railroad Company, a corporation having its principal place of business in the city of Chicago, and which operated a continuous line of road between Chicago and New York. He had not taken out a license for the quarter ending March 31, 1888, as required by the provisions of the aforesaid order. As such agent his duties consisted in soliciting passenger traffic in that city and county over the road he represented. He did not sell tickets to such passengers over that road or any other, but took them to the Central Pacific Railroad Company, where the tickets were sold to them. The only duty he was required to perform for such company was to induce people contemplating taking a trip east to be booked over the line he represented. He neither received nor paid out any money or other valuable consideration on account thereof. On the 3d of June, 1888, the plaintiff in error was convicted of misdemeanor in the police judge's court of the city and county of San Francisco for violation of the provisions of the aforesaid order, and on the 16th of November of that year, after a motion for a new trial and a motion in arrest of judgment had both been denied, the court sentenced him to pay a fine of \$20, and in default of the payment thereof to imprisonment in the county jail of the city and county until the same should be paid, for a period not exceeding twenty days. Upon appeal to the superior court of the city and county of San Francisco, that court affirmed the judgment below, and this writ of error was then sued out.

There are three assignments of error, which are reducible to the single proposition that the order under which the plaintiff in error was convicted is repugnant to clause 3 of section 8, article 1, of the constitution of the United States, commonly known as the "commerce clause" of the constitution, in that it imposes a tax upon interstate commerce, and that, therefore, the court below erred in not so deciding, and in rendering judgment against the plaintiff in error. This proposition presents the only question in the case, and, if it appears from this record that the business in which the plaintiff in error was engaged was interstate commerce, it must follow that the license tax exacted of him as a condition precedent to his carrying on that business was a tax upon inter-

state commerce, and, therefore, violative of the commercial clause of the constitution. In the recent case of *Lyng v. State of Michigan* (decided April 28th ult.), this court said: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress." In *County of Mobile v. Kimball*, 102 U. S. 691, 702, this court defined interstate commerce in the following language: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." Pomeroy, in his work on Constitutional Law (section 378), referring to the signification of the word "commerce," says: "It includes the fact of intercourse and of traffic, and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places, and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. All these may, therefore, be regulated."

Tested by these principles and definitions, what was the business or occupation carried on by the plaintiff in error on which the tax in question was imposed? It is agreed by both parties that his business was that of soliciting passengers to travel over the railroad which he represents as an agent. It is admitted that the travel which it was his business to solicit is not from one place to another within the state of California. His business, therefore, as a railroad agent, had no connection, direct or indirect, with any domestic commerce between two or more places within the state. His employment was limited exclusively to inducing persons in the state of California to travel from that state into and through other states, to the city of New York. To what, then, does his agency relate, except to interstate transportation of persons? Is not that

as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of freight from San Francisco to New York city over that line of railroad? If the business of the New York, Lake Erie and Western Railroad Company, in carrying passengers by rail between Chicago and New York and intermediate points, in both directions, is interstate commerce, as much so as is the carrying of freight, it follows that the soliciting of passengers to travel over that route was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the "means" by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple.

In *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489; 7 Sup. Ct. Rep'r, 592, the taxing district of Shelby county, Tenn., which included the city of Memphis, acting under the authority of a statute of that state, attempted to impose a license tax upon a "drummer" for soliciting, within that district, the sale of goods for a firm in Cincinnati which he represented; but this court decided that such a soliciting of business constituted a part of interstate commerce, and that the statute of Tennessee imposing a tax upon such business was in conflict with the commerce clause of the constitution of the United States, and was, therefore, void. A like decision was rendered in *Leloup v. Port of Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep'r, 1380; and in *Asher v. Texas*, 128 U. S. 129; 9 Sup. Ct. Rep'r, 1, both of these decisions were carefully considered, and the principle was affirmed. In *Stoutenburgh v. Hennick*, 129 U. S. 141; 9 Sup. Ct. Rep'r, 256, the same question came before the court, and the principle governing the cases to which we have referred was again carefully considered and affirmed. See, also, *Pickard v. Car Co.*, 117 U. S. 34; 6 Sup. Ct. Rep'r, 635; *Fargo v. Michigan*, 121 U. S. 230; 7 Sup. Ct. Rep'r, 857; and the recent cases of *Leisy v. Hardin*, 135 U. S. 100; and *Lyng v. State of Michigan* 135 U. S. 161, decided April 28, 1890.

We might conclude our observations on the case with the above remarks, but we deem it proper to notice some of the points raised by the defendant in error, and which were relied upon by the court below to control its decision sustaining the validity of the aforesaid order. It is argued that the New York, Lake Erie and Western Railroad Company is a foreign corporation operating between Chicago and New York city, wholly outside of and distinct from California; and it is very earnestly contended that the business of soliciting passengers in California for such a road cannot be interstate commerce, as it has not for its end the introduction of any thing into the state. We do not think that fact, even as stated, is material in this case. The argument is based upon the assumption that the provision in the constitution of the United States relating to commerce among the states applies as a limitation of power only to those states through which such commerce would pass, and that any other state can impose any tax it may deem proper upon such commerce. To state such a proposition is to refute it; for if the clause in question prohibits a state from taxing interstate commerce as it passes through its own territory, *a fortiori* the prohibition will extend to such commerce when it does not pass through its territory. The argument entirely overlooks the fact that in this case the object was to send passenger traffic out of California, into and through the other states traversed by the road for which the plaintiff in error was soliciting patronage.

It is further said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defense, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is, was this business a part of the commerce of the road?

Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent. The court below relied mainly upon *Railroad Co. v. Com.*, 114 Penn. St. 256; 6 Atl. Rep'r, 45; *Mining Co. v. Pennsylvania* 125 U. S. 181; 8 Sup. Ct. Rep'r, 737; and *Smith v. Alabama*, 124 U. S. 465; 8 Sup. Ct. Rep'r, 564 — to support its judgment. But we are of opinion that neither of the cases in this court sustains that position. The other case we have disposed of in a separate opinion, reversing the judgment of the court below. *Mining Co. v. Pennsylvania* manifestly is not an authority in favor of the position of the court below, but rather the reverse. In that case a company incorporated under the laws of Colorado, for the purpose of doing a general mining and milling business in that state, had an office in Philadelphia, "for the use of its officers, stockholders, agents, and employees." The state of Pennsylvania, through her proper officers, assessed a tax against the corporation for "office license," which the company resisted, on the ground that the act under which the assessment was levied was in conflict with the "commerce clause" of the constitution of the United States, in that it was an attempt to tax interstate commerce, as such. The Pennsylvania courts affirmed the validity of the assessment, and, a writ of error having been sued out, the case was brought here for review. This court held that the state legislation in question did not infringe upon the commercial clause of the constitution, because it imposed no prohibition upon the transportation into the state of the products of the corporation, or upon their sale in the state, but simply exacted a license tax from the corporation for its office in the commonwealth; and went on to say: "The exaction of a license fee to enable the corporation to have an office for that purpose within the commonwealth is clearly within the competency of its legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one state cannot, with some exceptions, to which we shall presently refer, do business in another state without the latter's consent, express or implied;" quoting at some length from *Paul v. Virginia*, 8 Wall. 168, to sustain the conclusion there reached. But the court further remarked that "a quali-

fication of this doctrine was expressed in *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, 12, so far as it applies to corporations engaged in commerce under the authority or with the permission of congress;” and in conclusion said: “The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority.” The reference to *Pensacola Tel. Co. v. Western U. Tel. Co.* clearly indicates that the court did not intend to lay down any rule recognizing the power of a state to interfere in any manner with interstate commerce.

The latter case was one in which the legislature of Florida had granted to the Pensacola Company the exclusive right of establishing and maintaining telegraph lines in two counties in that state, and this court held that such legislation was in conflict with the act of congress of July 24, 1866, granting to any telegraph company the right “to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under or across the navigable streams or waters of the United States,” etc. This court held such state legislation unconstitutional, as interfering with interstate commerce, and in its opinion announced no doctrine not in harmony with the principles of the later decisions to which we have referred. *Smith v. Alabama* was a case in which an act of the state legislature imposing a license upon any locomotive engineer operating or running any engine or train of cars on any railroad in that state was resisted by an engineer of the Mobile and Ohio Railroad Company, who ran an engine drawing passenger-coaches on that road from Mobile, in the state, to Corinth, in Mississippi, on the ground that the statute of the state was an attempt to regulate interstate commerce, and was, therefore, repugnant to the commercial clause of the constitution of the United States. We held, however, that the statute in question was not in its nature a

regulation of commerce; that, so far as it affected commercial transactions among the states, its effect was so indirect, incidental and remote as not to burden or impede such commerce, and that it was not, therefore, in conflict with the constitution of the United States or any law of congress. It having been thus ascertained that the legislation of the state of Alabama did not impose any burden or tax upon interstate commerce, there is nothing to be found in the opinion in that case that is not in harmony with the doctrines we have asserted in this case. That opinion quoted at length from *Sherlock v. Alling*, 98 U. S. 99, 102, 103, where it was expressly held that "the states cannot by legislation place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuits in particular channels, or conditions for carrying it on." It results from what we have said that the judgment of the court below should be, and it hereby is, reversed, and the case is remanded to that court for further proceedings in conformity with this opinion.

Fuller, C. J., and Gray and Brewer, JJ., dissented.

See next case and note thereto.

NORFOLK & WESTERN R. CO. V. PENNSYLVANIA.

(10 Sup. Ct. R. 958; 136 U. S. 114.)

1. FOREIGN CORPORATIONS. CONSTITUTIONAL LAW. INTERSTATE COMMERCE. A statute of Pennsylvania provided that no foreign corporation, which did not invest or use its capital within the state, should have an office within the state, unless it should first pay an annual license fee of one-fourth of a

mill on each dollar of its capital stock. The N. & W. R. Co., was a corporation existing under the laws of Virginia and West Virginia, whose line of road by means of certain traffic arrangements with other railroads had become a link in a through line over which passengers and freight were transported into and out of the state. During certain years it maintained an office in the city of Philadelphia and this was a proceeding to enforce the above-mentioned tax. Held, that corporations are not citizens within clause 1, section 2, article 4 of the constitution of the United States and that section 1 of the fourteenth amendment did not prevent a state from imposing such conditions upon foreign corporations as it saw fit, as a condition of their doing business within the state and, therefore, that the statute in question was not invalid by virtue of either of the above provisions.

2. INTERSTATE COMMERCE. TAXATION OF. It was further held that the railroad company was engaged in interstate commerce and that the tax in question was a tax upon one of the means or instruments by which it carried on its business of interstate commerce and was, therefore, unconstitutional and void.

M. E. Olmsted for plaintiff in error. *W. S. Kirkpatrick* and *John F. Sanderson* for defendant in error.

LAMAR, J. The sixteenth section of an act of the legislature of the commonwealth of Pennsylvania, approved June 7, 1879 P. L. 112, 120) provides as follows: "That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this commonwealth, shall have an office or offices in this commonwealth for the use of its officers, stockholders, agents or employes, unless it shall have first obtained from the auditor-general an annual license so to do; and for said license every such corporation shall pay into the state treasury, for the use of the commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have; and the auditor-general shall not issue a license to any corporation until said license fee shall have been paid. The auditor-general and state treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section, for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same; provided, that no license fee shall be necessary for any corporation paying a tax under any previous section of this act, or whose capital stock, or a majority thereof, is owned or controlled by a corporation of this state which does pay a tax under any previous section of this act."

Under the authority vested in him by that statute, the auditor-general of the state assessed a license tax against the Norfolk and Western Railroad Company, a corporation existing under the laws of Virginia and West Virginia, for each of the two years ending July 1, 1885, on its capital stock of \$25,000,000, at the rate prescribed in the act, amounting to \$6,250 a year, on account of its having an office for the use of its officers, stockholders, agents and employes in the city of Philadelphia. The case now before this court involves the claim of the state for the year ending July 1, 1884, only. As permitted by the laws of Pennsylvania, the company appealed from the auditor-general's settlement to the court of common pleas of Dauphin county, in that state. The case was tried in that court without the intervention of a jury, under an act of the state legislature approved April 22, 1874, and the court made the following findings of fact: "(1) The defendant is a railroad corporation existing under the laws of the states of Virginia and West Virginia, and its main line and branches lie wholly within these states. (2) Its line of railroad connects at several points with the railroads of other corporations; and by virtue of these connections, and certain traffic contracts and agreements, it has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this commonwealth. (3) Its authorized capital stock is \$25,000,000. (4) From July 1, 1883, to July 1, 1885, it had an office in this commonwealth for the use of its officers, stockholders, agents and employes. Its main office is at Roanoke, Va. (5) During this period it expended a considerable amount of money in Pennsylvania in the purchase of materials and supplies for the use of its road; but, with trifling exceptions, it owns no property, and has no capital invested for corporate purposes, within this commonwealth. (6) It has paid no office license fee for the years named, as required by section 16 of the act of 1879 (P. L. 120). Upon this section these settlements are based." Judgment was rendered against the company on that finding, sustaining the settlement made by the auditor-general of the state for the sum of \$7,503.12. That judgment having been affirmed by the supreme court of the state, this writ of error was sued out. The assignment of errors is to the effect that the court below erred in refus-

ing to sustain the following points, urged by the company, both in the trial court and in the supreme court of the state, viz.:

"(1) Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations, and to the officers, agents and employes of foreign corporations, the right to have an office or place of meeting in the state of Pennsylvania, the said section is in conflict with clause 1 of section 2 of article 4 of the constitution of the United States, which provides that 'the citizens of each state shall be entitled to all privileges * * * of citizens in the several states.' (2) The sixteenth section of the act of June 7, 1879, is an abridgment of the privileges and immunities of the citizens of the United States; it discriminates between corporations of the state of Pennsylvania and corporations of other states; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations, and to natural persons connected with such corporations, particularly this defendant and its officers, agents and employes, who were in the state maintaining an office and doing business at and before the passage of the said act, the equal protection of the laws, and is for these reasons void, because in conflict with article 14 of the amendments to the constitution of the United States, and also because in conflict with the act of congress (R. S., § 1977).

(3) Inasmuch as the Norfolk and Western Railroad Company engaged in the business of transporting freight and passengers to or from other states out of or into the state of Pennsylvania, or from other states to other states, passing through the state of Pennsylvania, and for the successful carrying on of said interstate business it is necessary for the said company to maintain one or more offices in the state of Pennsylvania, therefore, the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said state without first obtaining from the auditor-general thereof a license so to do and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause 3 of section 8 of article 1 of the constitution of the United States, which provides that 'congress shall have power to regulate commerce with foreign nations and among the several states.' "

The first two points are disposed of adversely to the company by the decision of this court in *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181; 8 Sup. Ct. Rep'r, 737. In that case we held, following *Paul v. Virginia*, 8 Wall. 168, that corporations are not citizens, within the meaning of clause 1, section 2, article 4, of the constitution of the United States, declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." And we also held that section 1 of the fourteenth amendment to the constitution, declaring that no state shall "deny to any person within its jurisdiction the equal protection of the laws," does not prohibit a state from imposing such conditions upon foreign corporations as it may choose as a condition of their admission within its limits. See, also, *Fire Ass'n v. New York*, 119 U. S. 110; 7 Sup. Ct. Rep'r, 108. The only question for consideration, therefore, arises under the third assignment of error, above set forth. It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits. Some of the cases sustaining this proposition are collected in *McCall v. California*, ante, and need not be repeated here.

The question before us is thus narrowed to the two following inquiries: (1) Was the business of this company in the state of Pennsylvania interstate commerce? (2) If so, was the tax assessed against it for keeping an office in Philadelphia for the use of its officers, stockholders, agents and employes a tax upon such business? We have no difficulty in answering the first of these inquiries in the affirmative. Although the findings of fact are somewhat meager on this question — much more so, indeed, than the undisputed evidence in the case warranted — enough is stated in the second paragraph of the aforesaid finding to show that the company is engaged in interstate commerce in the state. It is there said, in substance: By virtue of its connections and certain traffic contracts with other railroads, the Norfolk and Western Railroad Company "has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this commonwealth." That is to say, the business of the through line of railroad, of which the

plaintiff in error forms a part, or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other states, and out of that state into other states. It certainly requires no citation of authorities to demonstrate that such business — that is, the business of this through line of railroad — is interstate commerce. That being true, it logically follows that any one of the roads forming a part of or constituting a link in, that through line, is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line. On this point, *The Daniel Ball*, 10 Wall. 557, 565, is an authority. In that case the steamer *Daniel Ball* was engaged in transporting goods on Grand river, wholly within the state of Michigan, destined for other states, and goods brought from other states destined for places in the state of Michigan, but did not run in connection with, or in continuation of, any line of vessels or railway leading to other states; and the contention was that she was not engaged in interstate commerce. But this court held otherwise, and said: "So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states; and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress." See, also, *Railway Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep'r, 4, and cases cited.

We pass to the second inquiry above stated, viz. : Was the tax assessed against the company for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employes, a tax upon the business of the company? In other words was such tax a tax upon any of the means or instruments by which

the company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. One of the terms of the contract by which the plaintiff in error became a link in the through line of road referred to in the findings of fact provided that "it shall be the duty of each initial road member of the line to solicit and procure traffic for the Great Southern Despatch [the name of said through line] at its own proper cost and expense." Again, the plaintiff in error does not exercise or seek to exercise in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the secretary of the commonwealth the certificate required by the act of the state legislature of 1874 enabling it to maintain an office in the state. That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce, and, as such, was in violation of the commercial clause of the constitution of the United States. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct. Rep'r, 826; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326; 7 Sup. Ct. Rep'r, 1118, and cases cited; *McCall v. California*, ante.

For the foregoing reasons the judgment of the court below is reversed, and the case is remanded to that court for further proceedings in conformity with this opinion.

Fuller, C. J., and Gray and Brewer, JJ., dissented.

INTERSTATE COMMERCE.

The power of the states to legislate with reference to matters affecting interstate commerce is one of great importance to railroads and other corporations engaged in such commerce. We have accordingly endeavored to bring together all the decisions of the supreme court of the United States touching the question which we have classified with reference to the subject-matter of the decisions rather than the general principles of the subject.

1. *Improvement of navigation*—wharves, pilots, dams, bridges, etc.—The states may make any improvement of harbors, streams and navigable

waters within their limits, which does not conflict with any law of congress or any system of improvement adopted by the general government, and may collect tolls or fees for the use of such improvements. *County of Mobile v. Kimball*, 102 U. S. 691; *Huse v. Glover*, 119 U. S. 543; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288. They may construct wharves and collect reasonable wharfage fees. *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 100 U. S. 423; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444. The reasonableness of such fees will be determined by reference to local laws and conditions. *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444. Wharfage fees may be graduated in proportion to the tonnage of vessels, but states may not, under the guise of wharfage, lay a "duty of tonnage." *Packet Co. v. Keokuk*, 95 U. S. 803; *Steamship Co. v. Port Wardens*, 6 Wall. 1; *Cannon v. New Orleans*, 20 Wall. 577. Nor can a state directly or indirectly lay a duty of tonnage, even on vessels engaged wholly in commerce within the state. *Ibid.*; and *State Tonnage Tax Cases*, 12 Wall. 204; *Peete v. Morgan*, 19 Wall. 581; *Inman Steamship Co. v. Tucker*, 94 U. S. 238. Nor can a state discriminate in its wharfage fees between goods produced in other states, and those produced within its own borders. *Guy v. Baltimore*, 100 U. S. 434. The states may regulate pilots and pilotage in the absence of any action on the subject by congress. *Cooley v. Board of Wardens*, 12 How. 299; *Sprague v. Thompson*, 118 U. S. 90.

A state may authorize the construction of bridges over streams within its jurisdiction, which are highways of commerce, and may prescribe rules and regulations for the use of draws in the same, and may cause dams to be constructed across such streams for the purpose of improving lands in the vicinity or promoting the health of the community. *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Hamilton v. Vicksburg, etc. R. Co.*, 119 U. S. 280.

2. *Quarantine and inspection laws.*—The states may pass and enforce quarantine and inspection laws, for the purpose of protecting its citizens against disease and the introduction of infectious or unwholesome commodities. *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Peete v. Morgan*, 19 Wall. 581; *Gibbons v. Ogden*, 9 Wheat. 203. But a quarantine law which amounts to the imposition of a tonnage tax is void. *Peete v. Morgan*, 19 Wall. 581.

3. *Statutes requiring the examination and licensing of certain railroad employes.*—Statutes requiring locomotive engineers to be licensed in order to exclude those who are incompetent and requiring that employes, serving in certain capacities upon railroads should pass an examination and obtain a certificate, in order to prevent accidents due to color blindness and defective vision, have been held valid even as to railroads engaged in interstate traffic. *Smith v. Alabama*, 124 U. S. 465; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96.

4. *Construction and maintenance of highways, railroads and other lines of transportation and communication.*—Each state may lay out and construct, or authorize to be laid out and constructed, within its own territory, such

highways, railroads, telegraph and other lines of transportation and communication as it sees fit. At the same time congress may construct, or authorize the construction, of similar works into, or through, a state for purposes of interstate traffic. *California v. Central Pacific R. Co.*, 127 U. S. 1; and see *Pacific Railroad Removal Cases*, 115 U. S. 1; *Santa Clara Co. v. Southern Pac. Ry. Co.*, 118 U. S. 394.

5. Taxing the instruments of commerce.—A state cannot impose a license tax upon sleeping-cars nor upon boats or vessels engaged in interstate commerce. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Tennessee v. Same*, 117 U. S. 51; *Moran v. New Orleans*, 112 U. S. 69; *Bain v. Richmond, etc., R. Co.*, ante. Such property having its *situs* within a state may be taxed in the same manner as other property. *State Tonnage Tax Cases*, 12 Wall. 204. The court says:

"Power to tax, with certain exceptions, resides with the state, independent of the federal government, and the power when confined within its true limits, may be exercised without restraint from any federal authority. They cannot, however, without the consent of congress, lay any duty on tonnage, nor can they levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, as without the consent of congress they are unconditionally prohibited from exercising any such power. Outside of those prohibitions the power of the states extends to all objects within the sovereign power of the state, except the means and instruments of the federal government. But ships and vessels owned by individuals and belonging to the commercial marine are regarded as the private property of their owners, and not as the instruments or means of the federal government, and as such, when viewed as property, they are plainly within the taxing power of the states, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the federal constitution.

"Argument, therefore, to show that they may be taxed as other property belonging to the citizens of the state is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally-conceived opinion, and is wholly unsupported by any judicial determination. Direct adjudication to support that proposition is not to be found in the reported decisions of this court, but there are several cases which concede that such a tax, if levied by a state, would be legal, and no doubt is entertained that the concession is properly made." See, also, *Le Loup v. Port of Mobile*, 127 U. S. 640, 649; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 580.

But ferry-boats on the Mississippi river plying between St. Louis and the Illinois shore, and owned by an Illinois corporation and stored on the Illinois side when not in use, cannot be taxed by the city of St. Louis as property "within the city." *St. Louis v. Ferry Co.*, 11 Wall. 423.

6. Taxation of agents and corporations engaged in interstate and foreign commerce.—A state cannot exact a license tax of drummers or persons engaged in selling goods to be imported from other states or countries, nor can it discriminate between those engaged in selling imported goods and goods of domestic production. *Brown v. Maryland*, 12 Wheat. 419; *Ward v. Maryland*, 12 Wall. 418; *Wetton v. Missouri*, 91 U. S. 275; *Webber v. Virginia*, 108 U.

S. 344; *Walling v. Michigan*, 116 U. S. 446; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141. A statute of Maryland which prohibited any person or corporation other than the grower, maker or manufacturer, from selling or offering for sale any goods, chattels, wares or merchandise within the state without a license, and prescribed a fee for such license graduated according to the amount of goods kept in stock by the applicant at the principal season of sale, was held to be void in so far as it applied to non-residents of the state or those selling goods to be brought into the state. *Carson v. Maryland*, 120 U. S. 502.

A statute of Tennessee which imposed a tax upon all peddlers of sewing-machines and selling by sample, and which applied to all without regard to where the articles sold were produced, was upheld in *Machine Co. v. Gage*, 100 U. S. 676. To the same effect is *Woodruff v. Parham*, 8 Wall. 123.

An ordinance of the port of Mobile imposed a license tax of \$225 upon telegraph companies. This was held to be void as to companies engaged in interstate traffic, overruling the case of *Osborne v. Mobile*, 16 Wall. 479. The court says:

"In our opinion such a construction of the constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress. This is the result of so many recent cases that citation is hardly necessary. * * *

"We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state as the property of other citizens is taxed, nor from regulating matters of local concern which may accidentally affect commerce, such as wharfage, pilotage and the like." Page 648.

7. *Taxation of the business or receipts of interstate commerce.*—A state cannot levy any tax upon the business of interstate commerce or upon the receipts from such business. *Case of the State Freight Tax*, 15 Wall. 232; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Alabama*, 132 U. S. 432. The case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, is virtually overruled by the later cases. See especially *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

A tax on the capital stock of a ferry company engaged in interstate traffic, according to the dividends declared by it, was held void in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. A tax upon the capital stock of a telegraph company, in the proportion which the length of its lines within the state bore to the total length of its lines, was upheld in *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530.

A tax on sales by auction of imported goods, none being levied upon sales of domestic goods, was held void in *Cook v. Pennsylvania*, 97 U. S. 586.

In chartering a railroad company a state may lawfully stipulate that it shall pay to the state one-fifth of the amount received by it from passenger fares and such a stipulation can be enforced though such fares may be derived in part from interstate traffic. *Railroad Co. v. Maryland*, 21 Wall. 456.

8. *Taxes on the subject-matter of interstate commerce, freight, passengers, messages, etc.*—A state cannot levy a tax upon passengers arriving from, or going to, a point without the state, nor upon the carrier for transporting such passengers, and any regulations which amounts to the imposition of such a tax will be void. *Passenger Cases*, 7 How. 283; *People v. Compagnie Générale Trans-Atlantique*, 107 U. S. 59; *Henderson v. New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Crandall v. Nevada*, 6 Wall. 35; and, see *Head Money Cases*, 112 U. S. 580.

A state tax on interstate telegraphic messages is void. *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Alabama*, 132 U. S. 472; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Le Loup v. Port of Mobile*, 127 U. S. 640.

The cases cited in the last section establish the proposition that freight, while in transit from one state to another cannot be taxed by the states. A state cannot impose a stamp duty on bills of lading of goods sent out of the state. *Almy v. State of California*, 22 How. 169. But such property is only exempt while in transit. The fact that it is awaiting transportation or is intended for export can make no difference. *Coe v. Errol*, 116 U. S. 517; *Kidd v. Pearson*, 128 U. S. 1. In the former case the court says:

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on the subject, namely, that such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many states there would be nothing but the lands and real estate to bear the taxes. Some of the western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not

begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing." Page 527.

Coal shipped from Pennsylvania to New Orleans and there held for sale on board the vessel is subject to taxation in Louisiana and it makes no difference that it is afterward sold to go out of the state. *Brown v. Houston*, 114 U. S. 622. Goods imported and sold by the consignee in cargo to arrive, the same to be delivered on board the purchaser's lighters and to be at the risk of the seller until so delivered, may be taxed in the hands of such purchaser. *Waring v. Mayor of Mobile*, 8 Wall. 110.

A tax of fifty cents per gallon upon all liquor brought into the state, to be paid by the importer, was held valid when a similar tax was levied upon all liquor manufactured in the state, to be paid by the manufacturer. *Hinson v. Lott*, 8 Wall. 148.

9. Regulation of interstate commerce—police power.—The validity of quarantine and inspection laws, though applicable to interstate commerce, has already been referred to in section 2 of this note. The ability of the states to affect interstate commerce through the police power has been the subject of much discussion in the recent cases. A statute requiring the master of a vessel from a foreign state or country to make a report as to passengers brought in his vessel was held valid. *City of New York v. Miln*, 11 Pet. 102. So a statute of Maryland prohibiting the export of tobacco in hogsheads unless inspected, passed and marked as therein provided. *Turner v. Maryland*, 107 U. S. 38.

A statute of Missouri prohibiting the bringing of Texas, Mexican or Indian cattle into the state between the 1st day of March and the 1st day of November in each year, except such as were taken through the state, and making no distinction between such as were healthy and such as were diseased, was held void. *Railroad Co. v. Husen*, 95 U. S. 465. But a statute of Iowa making a person liable for damages by spread of Texas fever, by having in his possession Texas cattle, which had not been wintered north of the southern boundary of Missouri, was upheld as valid. *Kimmish v. Ball*, 129 U. S. 217.

A statute of Minnesota, prohibiting the sale of fresh beef, veal, mutton, lamb or pork for human food, unless the animals from which the same was taken should have been inspected within the state before being slaughtered, was held to be an unconstitutional interference with interstate commerce. *Minnesota v. Barber*, 186 U. S. 313; S. C., 39 Fed. Rep'r, 641; *Swift v. Sutphin*, 39 Fed. Rep'r, 630.

It is now settled that, apart from the recent legislation of congress, a state cannot prohibit the sale of liquor, brought into it from another state and offered in the original packages. *Leisy v. Hardin*, 135 U. S. 100; *Lyng v. Michigan*, 135 U. S. 181. The prior decisions on the validity of prohibitory liquor laws are as follows: *Kidd v. Pearson*, 128 U. S. 1; *Mugler v. Kansas*, 128 U. S. 623; *Foster v. Kansas*, 113 U. S. 201; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Bartemeyer v. Iowa*, 18 Wall. 129; *License Cases*, 5 How. 504.

A statute of Iowa forbidding a carrier from bringing liquor into the state without being furnished with a certificate that the consignee is authorized to sell liquors by the laws of the state was held to be void. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465.

A statute requiring carriers by water to give all persons equal rights upon all parts of their vessels is void in so far as it applies to interstate business. *Hall v. De Cuir*, 95 U. S. 485. But a regulation in regard to the accommodations which carriers were required to furnish white and colored passengers respectively, which was held by the supreme court of the state to apply to domestic traffic only, was sustained in *Louisville, etc., R. Co. v. Mississippi*, 1 Am. R. R. & Corp. Rep. 724; S. C., 133 U. S. 587.

A state statute to prevent unjust discrimination in the charges of common carriers is void as to interstate traffic. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557. See *State, ex rel., v. Cincinnati, etc., R. Co.*, ante, 106.

A statute of Indiana requiring telegraph companies to deliver messages, if the persons to whom they were addressed lived within one mile of the receiving office, was held void as to messages received from, or sent without, the state. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347.

A state cannot grant an exclusive right to navigate certain waters within its jurisdiction, if such waters are ways of commerce with foreign states. *Gibbons v. Ogden*, 9 Wheat. 1. So it has been held that a state cannot grant an exclusive right to maintain and operate a telegraph over a railroad right of way. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

A law of Indiana giving an action for causing the death of a person was held valid as against interstate carriers. *Sherlock v. Alling*, 98 U. S. 99.

10. To what the power of congress extends or what is included under the power "to regulate commerce with foreign nations and among the several states."—The foregoing brief review of the decisions of the supreme court shows that the power of congress embraces every thing which directly relates to interstate or foreign commerce. The constitutional provision in question places under the control of congress all navigable waters which, though wholly within a state, form part of a system over which interstate or foreign commerce may be carried on. *Miller v. New York*, 109 U. S. 885; *Gibbons v. Ogden*, 9 Wheat. 1. The jurisdiction of congress extends to all waters which are navigable in fact, and not merely to those in which the tide ebbs and flows. *The Daniel Ball*, 10 Wall. 557.

Under this power congress may construct or authorize the construction of highways, railroads and telegraph lines into or through states for the purpose of facilitating commerce. *California v. Central Pacific R. Co.*, 127 U. S. 1. And highways, railroads and telegraph lines constructed under state authority, may be controlled and regulated by congress, with reference to their use for

interstate or foreign commerce. *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

The entire business of interstate commerce is subject to the control of congress, and it can neither be regulated, taxed or prohibited by the states. This is the purport of all the decisions. This exemption from state control extends not only to the process of transportation or transmission, but to all the means and agencies set on foot for the purpose of promoting such commerce and in case of commodities, includes the disposition of the same after they have reached their destination.

11. To what extent the power of congress is exclusive.—A long line of decisions has now firmly established a distinction between those matters relating to interstate commerce, which are local in their nature and can only be properly provided for by local or special laws, and those which are general or national and admit of a uniform system or regulation. With respect to the former the power of congress is concurrent with that of the states and the latter may regulate such matters until congress acts. With respect to the latter the power of congress is exclusive and its non-action is equivalent to an express declaration that, with respect to such matters, commerce among the states shall be free and untrammelled. *Leisy v. Hardin*, 135 U. S. 100, 119; *Stoutenburgh v. Hennick*, 129 U. S. 141, 148; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465, 507; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336; *Robbins v. Shelby County Taxing District*, 120 U. S. 489-492, 493; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Brown v. Houston*, 114 U. S. 622, 630; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701, 702; *County of Mobile v. Kimball*, 102 U. S. 691; *Henderson v. Mayor, etc., of New York*, 92 U. S. 259; *Case of State Freight Tax*, 15 Wall. 232, 278, 280; *Cooley v. Board of Wardens*, 12 How. 299, 314.

A few quotations from recent cases will illustrate this distinction. In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, the court says:

"Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties and other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged. The subjects therefore, upon which the power may be exerted, are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and be-

tween the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in congress."

In *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492, 498, the court says:

"1. The constitution of the United States having given to congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character or admit only of one uniform system or plan of regulation.

"2. Another established doctrine of this court is, that, where the power of congress to regulate is exclusive, the failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom.

"8. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is, when, by virtue of its police power and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes on all property within the state, mingled with and forming part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to congress over the subject."

Again, in *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465, 407, 408: "The doctrine now firmly established is, that, where the subject upon which congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it and provide the needed regulations. The absence of any law of congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

12. The power of congress is in all cases paramount. — This is implied in all the cases cited in the last section and has been expressly declared in many of the cases already referred to. Indeed it is only in the absence of congressional action that the states can act at all, even in those matters which are local in their nature. When congress acts the authority of the states is superseded. *County of Mobile v. Kimball*, 103 U. S. 691, 699; *Sprague v. Thompson*, 118 U. S. 90.

STANLEY V. WABASH, ETC., RY. CO.

(18 S. W. R. 709; 100 Mo. 435.)

1. RAILROAD COMPANIES. INTERSTATE COMMERCE. A statute of Missouri required persons, owning or operating railroads in that state, to furnish double-decked cars for the transportation of sheep and, in case they failed or refused so to do, made it unlawful for them to charge or receive more than half the regular rates for transporting stock. Held, that the statute will not be construed to have any extra-territorial effect, and that if, as properly construed, it applied to interstate commerce, it would be void.

2. The plaintiff, having been obliged to ship sheep in ordinary cars from a point in Missouri to a point in Illinois, recovered a judgment under the statute for excess of freight charged and paid. The judgment was reversed.

THE second count of the petition is as follows: "(2) Plaintiff, for another and further cause of action, states that the defendant, in shipping said sheep as aforesaid, placed and carried them in

twelve single-decked cars, and failed and refused and neglected to furnish plaintiff with double-decked cars, as it was its lawful duty to do; and the defendant, in violation of the statute in such cases made and provided, charged and collected of plaintiff, for the carrying of said sheep from said La Plata, Mo., to East St. Louis, Ill., at the rate of twenty-five dollars per car for twelve cars, making the sum of three hundred dollars received by the defendant for the transportation of said sheep, which was the full legal rate of freight allowed for the shipment of stock, and was one hundred and fifty dollars in excess of the amount that the defendant could lawfully charge for such transportation of said sheep in a single-decked car. Wherefore the plaintiff says an action hath accrued to him to have and recover of defendant the sum of one hundred and fifty dollars, the excess so charged as aforesaid, for which plaintiff demands judgment." This count is based upon the statute entitled "An act to require railroad companies to furnish double-decked cars for the shipment of sheep, and providing a penalty for failing so to do," approved March 18, 1881. A trial by the court, without the intervention of a jury, resulted in a judgment for plaintiff in the sum of \$105, which caused an appeal by the defendant to the Kansas City court of appeals, from which court the cause was transferred to this court on a jurisdictional ground. Other points are unnecessary to be set forth now, as they will be sufficiently stated in the opinion.

Wells H. Blodgett and *George S. Grover* for appellant. *Sears & Guthrie* for respondent.

SHERWOOD, J. (after stating the facts as above). 1. The second count of the original opinion charged that the contract was made to ship the sheep from La Plata, Mo., to St. Louis, Mo., but the amended petition charged the contract was to ship the sheep from La Plata, this state, to East St. Louis, Ill.; and upon this it is claimed that there was a change in plaintiff's cause of action. This point need not be discussed, because it appears that the answer of the defendant to the original petition was considered as replied to the amended petition, and, this being done without objection, cannot be objected to here for the first time. Nor need the action of the trial court as to plaintiff's first count be considered,

seeing that it was in favor of the defendant, and the plaintiff does not appeal. The statutory provisions upon which this action is brought are as follows: "Section 1. All railroad companies, private companies or individuals owning or operating a railroad or railroads in the state of Missouri, are required to furnish a sufficient number of double-decked cars for the shipment of sheep to supply the demand for such cars on their respective lines, and to allow shippers to load both decks in said cars with sheep to the aggregate extent of (20,000) twenty thousand pounds; which cars, so loaded, shall be received and transported by such railroad companies, or private companies or individuals, as one car-load of stock; and it shall not be lawful for said railroad companies, private companies, or individuals to charge or receive for the transportation of a double-decked car of sheep more than the legal rate of freight allowed for the shipment of stock. Sec. 2. Should any railroad company, or private company or individuals, owning or operating a railroad or railroads in the state of Missouri, refuse or neglect to furnish cars as provided in the preceding section, it shall not be lawful for them to charge or receive for the transportation of a car of sheep more than one-half the legal rate of freight allowed for the shipment of stock." It will not be intended that this statute was to have any extra-territorial force, since this would be beyond the power of the legislature of this state. General presumptions of this sort always attend legislative acts. *Merrill v. Railroad Co.*, 21 Am. & Eng. R. Cas. 48, and cases cited; 2 Ror. Railr. 1151; Ror. Int. St. Law, 149-154.

2. But if, as held by the trial court, the statute under discussion can be held to apply to interstate shipments, then it is an attempted regulation of commerce, and violates article 1, section 8, of the constitution of the United States. *Gibbons v. Ogden*, 9 Wheat. 1; *Welton v. Missouri*, 91 U. S. 275; *Railroad Co. v. Husen*, 95 U. S. 465; *Hall v. De Cuir*, 95 U. S. 485; *Manufacturing Co. v. Ferguson*, 113 U. S. 727; 5 Sup. Ct. Rep'r, 739; *Hardy v. Railroad Co.*, 18 Am. & Eng. R. Cas. 432, and cases cited; *Carton v. Railroad Co.*, 59 Iowa, 148; 13 N. W. Rep'r, 67; *Louisville & N. R. Co. v. Railroad Commissioners*, 16 Am. & Eng. R. Cas. 1. "The legislative authority of every state must spend its force within the

territorial limits of the state." Cooley Const. Lim. 151. Controlled by these considerations, we reverse the judgment.

All concur.

See *McCall v. California*, ante ; *Norfolk, etc., R. Co. v. Pennsylvania*, ante ; *Louisville, etc., R. Co. v. Mississippi*, 1 Am. R. R. & Corp. Rep. 724.

BECKE V. MISSOURI PAC. RY. CO.

(13 S. W. R. 1068; — Mo. —.)

1. RAILROAD COMPANIES. IMPUTED NEGLIGENCE OF DRIVER. Plaintiff's husband died of injuries which he received while riding in a public hack, which was run into by a train while crossing defendant's tracks at a highway crossing. Held, the negligence of the driver could not be imputed to the deceased, and that plaintiff could recover, if the deceased's injuries were due to the negligence of the defendant, though the driver's negligence also contributed thereto.

2. FAILURE TO HAVE HEAD-LIGHT AFTER DARK MAY BE NEGLIGENCE PER SE. It is not error to declare to the jury as matter of law that for a train to approach a public crossing near a city after dark without the head-light burning is negligence.

3. AMOUNT OF RECOVERY. A statute of Missouri provides that the recovery shall be \$5,000 "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars." In this case the injury was the result of negligence in failing to give the statutory signals or in failing to have the head-light burning. Held, that in either case it was within the statute and the court properly directed a verdict for \$5,000.

T. J. Portis and *Bennett Pike* for appellant. *A. R. Taylor* for respondent.

BRAOE, J. In this action plaintiff sues to recover damages for the death of her husband, Charles Becke, who was a passenger in a public stage or hack that was struck by a train of defendant at a public crossing a short distance from Nevada, Mo., thereby causing the said coach to be overturned, and the said Becke injured so that he died within two days after the collision, from such injuries. The plaintiff had judgment for \$5,000, and the defendant appeals. The only errors urged as grounds for reversal are upon the instructions. They may all be considered upon in-

structions 1 and 3 given for plaintiff, and instruction A refused for the defendant:

"No. 1. If you find from the evidence that plaintiff was the wife of Charles Becke when he died; and that on January 16, 1886, said Charles Becke was a passenger on a public stage or hack going from Montevallo to Nevada, in Missouri, and had no control over the driver thereof, or of the management of said hack; and that the hack in which said Becke was then such passenger was struck on said day by an engine of defendant at the crossing of the railroad and a traveled public road near Nevada, Mo., and not within any city; and that in consequence of said collision said Becke received injuries from which he died at Nevada, Mo., on or about January 18, 1886; and if you further find, from the evidence, that said collision directly resulted from or was caused by the omission of defendant's employes in charge of said engine to give any of the signals mentioned in instruction No. 2; and that said Charles Becke, at and prior to said collision, was himself exercising ordinary care to avoid injury and danger—then your verdict should be for plaintiff, and you should assess her damages at the sum of \$5,000."

"No. 3. If you find, from the evidence, the facts to be as mentioned in instruction No. 1, except as to the omission of signals, and find on that point that one of the signals mentioned therein (and more particularly described in instruction No. 2) was given; but if you then further find, from the evidence, that at the time and place of said collision it was no longer daylight, but was after dark, and that there was no head-light lit or burning on said engine, and that in consequence of said omission said collision occurred at said crossing—then your verdict should be for plaintiff, and you should then assess her damages at the sum of \$5,000, that being the measure of damages fixed by the statute in this case in the event you find for the plaintiff under these instructions and the evidence before you."

"A. The court instructs the jury that if they believe from the evidence that on the 19th day of January, 1886, one Hanley was driving a hack from Montevallo to Nevada, and that he had driven that hack from Nevada to Montevallo and back six days each week for one-third of the time since the 1st of December, 1885, and had known the road ever since the railroad was built

for four or five years, and had been over it often during that time, and knew said public road on which he was traveling crossed the defendant's railroad at a point from a mile to a mile and a quarter south-east of the town of Nevada in open prairie land, where the railroad train could be seen from half a mile to a mile and a quarter before the train reached said crossing, and that said train could have been seen or heard by said Hanley for a distance of thirty rods or more before he reached the crossing if he had looked in the direction of the train, or could have been heard by him if he had listened carefully, or if it was after dark in the evening, from 6:10 to 6:25 o'clock, p. m., and said Hanley had stopped and carefully looked and attentively listened, that he could have seen or heard the train, and that said Hanley knew it was about train time, and, notwithstanding, said Hanley drove his team and hack onto the railroad crossing without stopping and carefully looking and attentively listening, and plaintiff's deceased husband was injured in consequence thereof, either by the train, or by reason of the team running away, upsetting the hack, and dragging deceased, or otherwise, the defendant is not liable for any injury so done, and the jury should find their verdict for defendant, whether the whistle was sounded, the bell was rung, or the head-light was lit or not."

1. It is contended by counsel for the defendant that the court committed error in refusing to instruct the jury that the plaintiff could not recover if the driver of the hack in which her husband was a passenger was guilty of negligence which contributed to the injuries which resulted in his death, and that the doctrine laid down in *Thorogood v. Bryan*, 65 E. C. L. 115 — that a passenger upon the vehicle of a common carrier who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons is so identified with the former as to be chargeable with their negligence in an action against the latter, and, therefore, only entitled to recover damages from his carrier — should govern the case. This doctrine, from the time it was first announced in *Thorogood v. Bryan*, in 1849, though afterward followed by the English courts for a time (*Armstrong v. Railway Co.*, L. R., 10 Exch. 47) was continually subjected to adverse comment and criticism, until recently, in the case of *The Bernina* (Jan. 24, 1887), 12 Prob. Div. 58, the whole question was

re-examined, and the authorities, English and American, reviewed by the court of appeals of England, and the doctrine condemned; and *Thorogood v. Bryan*, and the cases that followed it, cannot any longer be considered authority even in England. Lord Esher, M. R., thus sums up in the *Bernina* case: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, we cannot see any principle upon which it can be supported, and we think that with the exception of the weighty observation of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is essentially unjust, and inconsistent with other recognized propositions of law. As to the propriety of dealing with it at this time in a court of appeal, it is a case which from the time of its publication has been constantly criticised. No one can have gone into * * * an omnibus, railroad or ship on the faith of the decision. We, therefore, think that, now that the question is for the first time before an English court of appeal, the case of *Thorogood v. Bryan* must be overruled." The doctrine of *Thorogood v. Bryan* has received the sanction of some American courts, notably in *Lockhart v. Lichtenhaler*, 46 Penn. St. 151, and others might be cited, but it has never been generally recognized or followed in this country — in fact, the great weight of American authority is against it; and to this conclusion the supreme court of the United States arrived in the recent case of *Little v. Hackett*, 116 U. S. 366; 6 Sup. Ct. Rep'r, 391, after a thorough consideration of the subject and a review of the American authorities. That it is unsound in principle, and against the weight of authority, is amply demonstrated in the following additional cases: *Chapman v. Railroad Co.*, 19 N. Y. 341; *Robinson v. Railroad Co.*, 66 N. Y. 11; *Dyer v. Railway Co.*, 71 N. Y. 228; *Bennett v. Railroad Co.*, 36 N. J. Law, 225; *Railroad Co. v. Steinbrenner*, 47 N. J. Law, 161; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Railway Co. v. Eadie*, 43 Ohio St. 91; 1 N. E. Rep'r, 519; *Cuddy v. Horn*, 46 Mich. 596; 10 N. W. Rep'r, 32; *Railway Co. v. Shacklet*, 105 Ill. 364; *Turnpike Road Co. v. Stewart*, 2 Metc. (Ky.) 119; *Railroad Co. v. Case*, 9 Bush, 728; *Tompkins v. Railroad Co.*, 66 Cal. 163; 4

Pac. Rep'r, 1165. The question has never been passed upon in this court, but, so far as judicial opinion upon this subject has been expressed by the court of appeals, it has been in harmony with the general current of American authority. *Hunt v. Railroad Co.*, 14 Mo. App. 160; *Keitel v. Railway Co.*, 28 Mo. App. 657. The recent and exhaustive consideration which this question has received in many of the cases cited, renders unnecessary any extended discussion of the principle involved. It is so plain that to maintain the doctrine would be to abrogate a well-settled rule of the common law, which gives a right of action for an injury resulting directly from the joint wrongful act of two wrong-doers against either or both of such wrong-doers, and that its effect would be to make an innocent person answerable for the wrong act of another over whom he has and exercises no control, and who is neither his servant nor his agent. That argument would seem unnecessary (whatever the authority to the contrary may have been) to show that such a doctrine ought not to stand. The court committed no error in refusing to instruct the jury that the contributory negligence of the driver, if any, would defeat plaintiff's right to recover.

2. The error complained of in the third instruction given for plaintiff is "that the court therein assumes, as matter of law, that the failure to have the head-light lit or burning at the time of the alleged collision was negligence on the part of the defendant. The uncontradicted evidence in the case was that the collision took place at a public crossing about a mile and a quarter south of the city of Nevada, on the 16th day of January, within half a mile of another crossing south, about six o'clock in the evening; that the night was dark; that the train was a passenger train from Joplin, going north to Kansas City, and was running at about twenty-five miles an hour. The court submitted to the jury the question whether the head-light was lit and burning, and whether it was dark at the time of the collision; and if it was dark, and the head-light was not lit or burning, whether the collision occurred in consequence of the omission to have the head-light lit and burning. All the disputed facts were submitted to the jury. "The court takes judicial notice of the power, speed and management of railroad trains and of common experience." "Where the facts are undisputed, the question whether they amount to negli-

gence or not may be one of law or fact." *Pierce Railr.* 315. "We agree that it is the province of the jury to * * * declare the law on the facts as found. In some cases the question of negligence may be determined by the court on the facts found or admitted. * * * Where, from the facts found or agreed upon, the question of negligence is one about which reasonable minds may differ, it should be left to the jury to make the deduction from all the circumstances to determine the ultimate fact." *Tabler v. Railroad Co.*, 98 Mo 79; 5 S. W. Rep'r, 810. "If upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but, if reasonable minds may differ as to the conclusion to be drawn from the given facts, then the question of negligence must be determined from all the surrounding circumstances. The question of negligence then becomes one of mingled law and fact, and must be determined by the jury." *Barry v. Railroad Co.*, 98 Mo. 62; 11 S. W. Rep'r, 308. "If the facts are such that all reasonable men would be likely to draw from them the same inferences, the question of negligence is one of law for the court; but, if they might differ as to the conclusion, the question is one of fact for the jury." *Pierce Railr.* 316. These quotations from the authorities define as well as may be the limit upon the power of the court to declare when an act is negligent. Reasonable minds might well differ as to whether a railroad company was guilty of negligence in not having a watchman stationed at a particular crossing, because the stationing of watchmen at all crossings is not the common and usual means of warning adopted by prudent railroad companies; hence it was error for the court to declare, as matter of law, that the absence of such watchman was negligence, as was held in *Welsch v. Railroad Co.*, 72 Mo. 451. But it is not possible that reasonable minds could come to any other conclusion than that the failure of those having in charge a passenger train, running through a populous country at the rate of twenty-five miles an hour, approaching a crossing near the suburbs of a city, in the night-time, on a dark night, to have the head-light of the engine lighted and burning, was an act of negligence. This is a common and necessary means adopted by all railroad companies for the protection alike of those rightfully on the train, and on the track, or approaching it, in the night-time. No engine is constructed with-

out such a light, and no train is run in the night-time by any railroad company, under any ordinary circumstances, without having it lighted. This is a fact known to all reasonable minds by common experience, and the court committed no error in declaring that it was negligence if the defendant's servants failed to have such light lighted and burning at the time of the collision. It is the duty of those approaching a railroad track at a public crossing in the night time to look that they may see an approaching train and the corresponding duty is imposed upon the employes of the railroad company to have the light burning, by means of which the approach of the train may be seen by those whose duty it is to look.

3. The last objection urged against the instructions is that the damages to be assessed are fixed by the court at the sum of \$5,000. There was no error in this. By statute, that sum is fixed as the damages to be given "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars." R. S., 1879, § 2121. The negligence in this case was that of the employes of the defendant in failing to give the statutory signal, or in failing to have the head-light lighted and burning. Either was negligence of the employes "whilst running, conducting or managing any locomotive, car or train of cars;" and in the application of this section "it can make no difference whether the negligence resulting in death is a breach of the statutory or a common-law duty." *Crumpley v. Railroad Co.*, 98 Mo. 34; 11 S. W. Rep'r, 244; *King v. Railroad Co.*, 98 Mo. 235; 11 S. W. Rep'r, 563. Finding none of the errors assigned well taken, the judgment is affirmed.

All concur, except Barclay, J., not sitting.

Negligence of driver contributing to injury.—See *Michigan City v. Boeckling*, 1 Am. R. R. & Corp. Rep. 446.

STATE V. CHICAGO, ETC., RAILROAD CO.

(45 N. W. R. 439; — Neb. —.)

1. RAILROAD COMPANIES. DUTY TO CONSTRUCT HIGHWAY CROSSINGS. The act of March 31, 1887, requiring railroad corporations to construct and keep in repair suitable crossings where railroads cross public highways, is constitutional.

2. Under that act it is the duty of a railroad company to make and keep in repair suitable crossings, with approaches, notwithstanding the highway was laid out after the railroad was built. The public authorities are required to build that part of the highway within the right of way which they would have been required to make had the railroad not been constructed.

3. JURISDICTION OF BOARD OF TRANSPORTATION. MANDAMUS. The board of transportation has jurisdiction to hear complaints and make orders in regard to the construction and repair of such crossings. Its order in that regard may be enforced by *mandamus*.

R. D. Stearns, William Leese, Attorney-General, and O. P. Mason for relator. *T. M. Marquette* for respondent.

NORVAL, J. This is an original application for *mandamus* to compel the respondent to construct a crossing where its road crosses public highway No. 1,119 of Lancaster county. The petition contains two counts. The first alleges "that the relator, the plaintiff, is the county of Lancaster, duly organized under the laws of the state of Nebraska. The defendant, the Chicago, Burlington and Quincy Railroad Company, commonly known as the 'Burlington and Missouri Railroad Company in Nebraska,' is a corporation duly organized under and by virtue of the laws of the state of Nebraska, and is authorized to do business, and is doing business, in this state, as a railroad company and a common carrier. That said railroad company is the present owner and operator of the Chicago, Burlington and Quincy railroad, and that said road crosses a public highway in the county of Lancaster and state of Nebraska, known as road No. 1,119, said public highway being laid out as a short connection between two duly laid out and traveled public highways, and as being on a section line, and that the Chicago, Burlington and Quincy railroad track crosses said public highway along said section line between the north-east quarter of section No. 34 and the south-east quarter of section No. 27, town 10, range 6, in Lancaster county, Nebraska,

and is in road district No. 2, Garfield precinct, in said county, and that said crossing is near the center of said quarter sections 34 and 27 aforesaid. That on or about the 17th day of September, 1888, the Chicago, Burlington and Quincy Railroad Company was duly notified as the owner and operator of the Chicago, Burlington and Quincy road as aforesaid, by one A. M. Trimble, then and now the supervisor of said district No. 2, aforesaid, to construct, make and put in said crossing within its right of way, and over and across its said right of way, said highway No. 1,119 being in said road district No. 2, as aforesaid, and being under the supervision and charge aforesaid of said supervisors. A copy of said notice is hereto attached and marked 'Exhibit A,' and made a part hereof. The plaintiff further alleges that said Chicago, Burlington and Quincy Railroad Company has not made a crossing of any kind at the point hereinbefore described, where the said Chicago, Burlington and Quincy railroad crosses said public road or highway No. 1,119. That no grading, ditching, bridging or other work of any kind has been done within the right of way of said railroad company, as required by law. That said road No. 1,119 is wholly useless to the public as a highway, for the purposes of travel, because of the refusal and neglect of said Chicago, Burlington and Quincy Railroad Company to comply with the requirements of the law, and said notice served upon it as aforesaid by said road overseer, A. M. Trimble. That road No. 1,119 is a connection between the A. street highway, which has been a public highway since October 4, 1887, and road No. 433, which was duly laid out as a public highway in the month of July, A. D. 1871, and has been traveled and used as a highway ever since. That road No. 1,119, connecting the above-described highways as aforesaid, is only one-half mile long, and is upon the section line between sections 34 and 27, and is much needed by a large commercial and busy community, who have no good road facilities for getting in and out of Lincoln, without great inconvenience, delay and expense. .

"A large and costly bridge has been constructed by the county commissioners of Lancaster county across Salt creek, and other bridges across branches of said stream have also been constructed near the point, and on the highway leading to the crossing of the said defendant's railroad, which said bridges are wholly useless,

and the work done wholly useless, unless said railroad crossing be put in as requested." The second count of the petition alleges that the relator, on November 15, 1889, filed a complaint, before the state board of transportation of the state of Nebraska, against the respondent, containing the same allegations as the first count of the petition above set forth. That the defendant filed its answer to said complaint with the board of transportation. A trial was had before said board upon the issues joined, and findings were made against the company, and it was ordered to put in the crossing, where said highway crosses its road, within sixty days after the service of the order upon the respondent, and that the order of the board of transportation was served on July 26, 1889, upon G. W. Holdrege, the general manager of the company.

The respondent demurs to the petition in this cause, and assigns the following grounds of demurrer: (1) That this court has no jurisdiction of the subject-matter of the action. (2) That said board of transportation had no jurisdiction to make the findings, and this court has no jurisdiction to enforce the findings of that body in a suit of this kind. (3) That the petition does not state facts sufficient to constitute a cause of action in favor of the relator, and against this respondent.

The respondent claims that, as the highway was laid out after the construction of the railroad, it is not the duty of the company to put in the crossing. In other words, a railroad company is only required to construct highway crossings at places where public roads were established prior to the building of the railroad. Section 1 of the act entitled "An act to compel railroad corporations and others to make and keep in repair crossings," which took effect March 31, 1887, provides that "any railroad corporation, canal company, mill-owner or any person or persons who now own, or may hereafter own or operate, any railroad, canal or ditch that crosses any public or private road, shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches and culverts that may be necessary, within their right of way." Section 2 provides that, when the corporation has failed to comply with section 1, the road supervisor shall give thirty days' notice in writing where the crossing is required. Section 3 provides that if the corporation

shall neglect, for sixty days from the giving of the notice, to make the crossing, suit may be brought to compel it to do so.

It cannot be doubted that said section 1 makes it the duty of railroad companies to make and keep in repair all crossings at public highways. The respondent insists that the act is not constitutional, as it imposes a burden on the corporation that did not exist when it was incorporated. Under the general public power of the state, the legislature has authority to place new and additional burdens upon corporations, when such burdens are for the safety of the people and for the public good, although the power to do so may not be reserved in the charter. This right has been so frequently recognized by the courts that it cannot longer well be questioned. The only difficulty is determining whether the new burden or restriction is really for the public safety. Of course, under the guise of the police power, property of corporations or individuals cannot be confiscated. If the requirements of section 1 of the act quoted were designed for the protection of lives and property, then it was within the scope of proper legislation. It is of vital importance to those traveling by rail or upon the public road that the crossings should be properly constructed and kept in good repair. These crossings require attention, the same as other portions of the track, and are liable to constantly get out of repair. The sectionmen in the employ of the railroad are daily passing over the track, and would soon discover a defect in the crossing, and remedy it. Not so with the road supervisor; he seldom sees the crossing. The company, by laying its ties and rails and making its grade, rendered a crossing necessary, and it is not unreasonable to place the burden on the one making it necessary. The interest of the public, as well as that of the railroad company, requires that the latter should have an exclusive control of the crossings. If inexperienced road supervisors were required to construct and keep in repair these crossings, great loss of life and property would likely result from the negligent construction of or the failure to keep in good order the crossings. The purpose of the legislature in placing this burden upon the railroad corporation was to secure the safety of the public travel and transportation. It has been frequently decided by the courts that, under the police power, the legislature may compel existing railroad corporations to fence their tracks and put in cattle-guards. Wilder

v. Railroad Co., 65 Me. 332; Thorpe v. Railroad Co., 27 Vt. 140. By a parity of reason the law-making power may make it the duty of railroad companies to construct and keep in repair highway crossings, notwithstanding the railroad was built before the enactment of the law. Such a burden is not in violation of the constitutional provision requiring that taxes shall be equal. Similar laws have been held constitutional. Railroad Co. v. Commissioners, 79 Me. 386; 10 Atl. Rep'r, 113; People v. Railroad Co., 70 N. Y. 569. The supreme court of Illinois, in Railroad Co. v. Bloomington, 76 Ill. 451, declare a similar law unconstitutional.

We do not mean to be understood as deciding that it is the duty of a railroad corporation to construct and keep in repair all highways laid on or across its right of way. What we hold is that it must construct suitable crossings, and that part of the highway within the right of way made necessary by the building of the railroad, and keep the same in repair. If the railroad track is laid above the natural surface of the ground where the highway crosses it, the crossing would include suitable approaches. If the track is below the natural surface of the ground, the crossing would include whatever is necessary to make a reasonably safe way for persons traveling the highway to cross the railroad. It cannot be said that the public good requires that the burden should be upon the railroad company to construct the remainder of the public highway within the right of way. No serious consequences would likely result from requiring the public authorities to construct the highway after the crossings and approaches are put in. We think that it is the duty of the public authorities to construct and keep in repair all the highways within the right of way which they would have been required to build had the railroad not been constructed. People v. Railway Co., 52 Mich. 277; 17 N. W. Rep'r, 841.

The relator also urges that it is entitled to compensation for the laying of a highway across its right of way. Section 16 of chapter 78 of the Compiled Statutes requires that claims for damages by reason of the location of highways shall be filed with the county clerk within a specified time. This section applies to all claims for damages. If the respondent failed to present its claim, it is waived. Its right to compensation cannot be litigated in this case. It is urged that the plaintiff has mistaken its remedy; that

under section 3 of the said act of March 31, 1887, the relator had an adequate remedy at law. We think that the remedy provided by the section is merely cumulative, and does not affect the right to enforce the obligation by *mandamus*. *State v. Stearns*, 11 Neb. 104; 7 N. W. Rep'r, 743; *People v. Railroad Co.*, 67 Ill. 118; *People v. Railroad Co.*, 58 N. Y. 152; *People v. Railroad Co.*, 74 N. Y. 302.

The board of transportation has jurisdiction to hear complaints and make orders in regard to the construction and repair of crossings where railroads intersect public highways. The authority is clearly conferred by section 2 of the act creating that board. The action of that tribunal must be obtained in order that this court may take cognizance of the case. *State v. Railroad*, 19 Neb. 478; 27 N. W. Rep'r, 434. We are of the opinion that the petition is sufficient. The demurrer is, therefore, overruled. Judgment accordingly.

The other judges concur.

Compelling railroad companies to construct or repair highway crossings.

—Some courts hold that a railroad company cannot be compelled to construct a highway across its track, even though the power to modify or repeal its charter is reserved. *Miller v. New York, etc., R. Co.*, 21 Barb. 513; *Illinois Central R. Co. v. Bloomington*, 76 Ill. 447; *People v. Lake Shore, etc., R. Co.*, 52 Mich. 277. Others hold the contrary. *Albany Northern Ry. Co. v. Brownell*, 24 N. Y. 345; *Boston & Albany R. Co. v. Greenbush*, 52 N. Y. 510; *Portland & Rochester R. Co. v. Deering*, 78 Me. 61; *Railroad Co. v. County Comrs.*, 79 Me. 886.

A railroad company may be compelled under the police power to construct cattle-guards and fences or widen and repair bridges over its road. *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717; *Thorp v. Rutland, etc., R. Co.*, 27 Vt. 140; *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512; *Emmons v. Minneapolis, etc., Ry. Co.*, 35 Minn. 505; *English v. New Haven & Northampton Co.*, 82 Conn. 240.

FEINBERG V. DELAWARE, ETC., R. Co.

(20 Atl. R. 33; — N. J. L. —.)

1. CARRIERS. LIVE STOCK. DELAY. INJURY FROM COLD. The defendant undertook to transport certain cattle for plaintiff from East Buffalo to New Jersey, but was delayed in starting them by a snow-storm on a distant portion of its route. While thus delayed the cold was intense, but not unusually so

for that locality, and by reason of insufficient shelter some of the cattle were frozen to death and others injured. Held, that the snow-storm was not the proximate cause of the loss but the neglect to take proper care of the cattle, and that the defendant was liable.

2. The fact that the plaintiff had a man to look after the cattle and accompany them to their destination, and who rode on a pass issued by the defendant, did not exempt the company from liability, there being no contract that the pass should have that effect.

THE plaintiff, Harris Feinberg, purchased sixty cows and forty-three calves at the Union Stock-Yards, East Buffalo, N. Y., and employed the defendant company to transport them from that point to Secaucus, Hudson county, N. J., March 12, 1888. Part of the freight was paid in advance, and part, under protest, on delivery of the cattle, March 17, 1888. They were driven by boys in the employ of the defendant from the Union Stock-Yards to the defendant's stock-yard, three miles, and soon after their arrival were loaded on the cars. Before this was finished, at about half-past four o'clock in the afternoon, all stock trains going east were stopped, by order of the company's train dispatcher, because of the great snow-storm known as the "blizzard." The employes of the company unloaded the cattle, and put them in their yard, under cattle-sheds, where they remained until Thursday, when they were reloaded and forwarded to Secaucus. Several calves died in the yard; some in the cars on the way. The cows were so badly frozen that eight or nine died within a week, and others were afterward sold at a loss. The snow-storm did not extend to East Buffalo, and the weather, during the time the cattle were delayed, was not unusual for that place, ranging from two degrees below zero on the first night, to ten, sixteen and thirty-four degrees above zero by Thursday. The cattle-sheds were of the usual kind, covered, and with sides, and an opening on the lanes. On the next morning after their receipt, they were removed to the best protected shed in the yard; and four cows, with calves just born, were put in a horse-stable of the company near the sheds. All were fed with corn and hay on request, and hay was sent with them on the cars. Feinberg had shipped cattle on the railroad before from that place, and a pass was issued at this time to an employe to go with the cattle. This person remained with them until they reached their destina-

tion. On these facts a verdict was found for the plaintiff, with \$2,000, damages.

James B. Vredenburg for plaintiff. *Bedle, Muirheid & McGee* for defendant.

SOUDDER, J. (after stating the facts as above). In this case the defendant, by its agents, was held out to the public generally as a carrier of goods for hire. This was established, by long-continued usage, to include live-stock as well as inanimate things. The plaintiff had sent cattle by this railroad from the same point several times before, and knew their facilities for transportation. On this occasion the only evidence of contract between the parties was a receipt given for payment of freight in advance. There was, therefore, no limitation by express contract of the common-law liability for the transportation of the live-stock from the point of acceptance for shipment to the point of delivery designated. There was no provision for delay, or other contingencies; nothing said as to a transfer of liability to the plaintiff because of the servant who accompanied the cattle, and rode on a free pass given by the company's freight agent. There can be no doubt that the defendant, on these facts, assumed the common-law duty of safely carrying these cattle according to the receipt or bill of lading; and, as a common carrier, it can only be relieved from such duty by the act of God, or of the public enemies, or, as some prefer to phrase it, by inevitable accident, which human foresight and power can neither anticipate nor control. This is the usual liability, unless some exception can be found. This rule is not applied in its strictness to perishable property, and injuries caused by its intrinsic defects; nor is the carrier who undertakes the carriage of live animals answerable for damages caused by the conduct or propensities of the animals themselves. As to these excepted cases, the carrier is liable only for want of due care in the transportation. Of the many cases that might be cited as authorities for this rule, with the qualifications above stated, the following only are here given: *Clarke v. Railroad Co.*, 14 N. Y. 570; *Smith v. Railroad Co.*, 12 Allen, 531; *Evans v. Railroad Co.*, 111 Mass. 142; *Mynard v. Railroad Co.*, 71 N. Y. 180; *Myrick v. Railroad Co.*, 107 U. S. 102; 1 Sup. Ct. Rep'r, 425; *Railroad Co. v. Spears*, 66 Ga. 485; *Railroad Co. v. Curtis*, 80 Ill. 324.

The court charged the law substantially and correctly, as above stated, and submitted the facts to the jury for their application. These show that the heavy snow-storm in the east caused the stoppage of the train on which the cattle were loaded. This was undoubtedly the act of God or inevitable accident not anticipated nor within the control of the railroad company's agent. But the cattle on the cars were not caught and overwhelmed by this violent snow-storm. They were still at East Buffalo, and had not started on their journey. The result of the snow-storm was that they were delayed, and it was not the proximate cause of the damage sustained. The direct cause of injury was the insufficient shelter given to the cows and calves while detained in the stock-yard of the defendant after they had been taken out of the cars to await the clearing of the storm, and the removing of obstructions from the railroad track. Neither the delay nor the cold weather were such that they could be classed as inevitable accidents. Delays are liable to occur by wrecking of trains, washing away of bridges and other misfortunes incident to the running and maintaining of railroads; and cold weather as great as this is not infrequent in that latitude in the winter and early spring. With these conditions, the agents of the company at their stock-yards continued their charge of the cattle, and put them where some were frozen and some died. It is said that the company did the best that was possible for them to do, as they had no building but the cattle-sheds that could be used for shelter. This is not entirely correct for there was a large stable for horses, substantially built and covered, belonging to the company, not far away from the sheds. Although this stable was intended to be used only for horses, it was not then required nor occupied for that purpose; and it might, in such an emergency as this, have been made the temporary covering and protection of these tender animals, which were so likely to be injured and killed by exposure. The jury found that the damages were caused by the want of proper care of the defendant's agent and not by inevitable accident as the direct cause; and in this finding, we think, they were right.

It is also objected that the presence of a servant of the plaintiff, who accompanied the cattle, riding on a free pass, exempted the defendant from responsibility, as they were thereby in the plain-

tiff's care. But there was no contract that the pass given should relieve the defendants from their common-law liability to care for the cattle and safely deliver them; and it was correctly charged to the jury that the mere fact of giving a pass, so that a servant of the owner might go with them to the journey's end, did not relieve the railroad company from responsibility.

The damages, \$2,000, although they appear to be large, are not satisfactorily shown to be excessive; and it is only where the jury have certainly erred in the amount that the court should interfere with their verdict for this cause. The rule to show cause will be discharged.

See *Gulf, etc., R. Co. v. Levi*, ante, p. 204; *Beard v. Illinois Central R. Co.*, 1 Am. R. R. & Corp. Rep. 513.

MAY V. BLACK ET AL.

(45 N. W. R. 949; — Wis. —.)

1. STOCKHOLDERS. ENFORCING LIABILITY OF, IN FOREIGN CORPORATION. A statute, under which a Michigan corporation was organized, made the stockholders liable for all labor performed for the corporation, the liability to be enforced by an action of *assumpsit*. It also required suit to be brought against any and all the stockholders and the corporation jointly and no execution was to issue until the property of the corporation was exhausted. Another section required actions against corporations to be commenced in the county where their works were situated or business office located. Held, that the remedy provided by the statute was exclusive and a bill in equity would not lie against part of the stockholders alone.

2. No action would lie in Wisconsin because jurisdiction could not be had of the corporation and because the statute prescribed a particular place for commencing the suit.

J. W. Hiner and *Van Dyke & Van Dyke* for appellants.
Coleman & Sutherland and *Quarles, Spence & Quarles* for respondent.

ORTON, J. This action was commenced by the respondent on a demand for work and labor, and in behalf of all others, having like claims, who may come in and become co-plaintiffs against the Nanaimo Mining Company, a corporation organized under the laws of the state of Michigan, and John C. Black and others,

stockholders of said corporation residing in this state, or amenable to the process of the court. The action is in equity, and the prayer is that the defendant stockholders be decreed and adjudged to pay into court, for the use of the plaintiffs, the amounts due each for such work and labor. No judgment is demanded against the corporation, and it did not appear in the action. It is alleged in the complaint that the corporation is insolvent, and that all of its property has been sold to pay its creditors in attachments. The judgment is at law, that the plaintiff and five others, who have become co-plaintiffs, "have and recover against the defendant, John C. Black \$1,838.34 and costs, and against John S. McDonald, \$529.74 and costs, and that execution issue in due form of law." The defendant, John C. Black, held stock as assignee of the said McDonald at the time the labor claims for which judgment was rendered against him accrued, and the defendant McDonald held the same stock when such claims for which judgment was rendered against him accrued, and said Black was not a stockholder when the suit was commenced, but the said McDonald was. The said Black was the cashier of the Continental National Bank of Chicago, and held the stock as such cashier, by assignment from McDonald, as collateral security for a loan made by him of the bank, and otherwise.

The important questions of law in the case were, therefore: (1) Were the stockholders at the time the debt accrued liable, or those who were such when the action was commenced, or are the stockholders of this corporation liable as co-partners or as sureties? (2) Could Black be held liable, holding such a relation to the stock and the bank? (3) Is this the proper remedy, and in the proper jurisdiction? On this appeal these questions were argued before this court by the respective and learned counsel with great force and ability. The third question, of remedy and jurisdiction, should stand first. If this court should hold that the plaintiff has mistaken his remedy or pursued it in the wrong tribunal or jurisdiction, it would be neither necessary nor proper to decide the first two questions. We are compelled by the authorities, and the reasons on which they are based, to hold in the negative as to both questions.

1. This is a corporation of the state of Michigan, and the liability of its stockholders, and the manner of its enforcement, are

governed by the laws of that state. It is a special statutory liability, to be enforced by statutory remedies. Section 35, No. 113, of the Public Acts of 1877, of that state, the general law under which this corporation was organized, provides that "the stockholders of all corporations existing hereunder shall be individually liable for all labor performed for such corporation, which said liability may be enforced by action in *assumpsit* commenced within two years from the time when payment for such labor became due, and not afterward." It would seem that an action against stockholders for such labor claims ought to be brought under this statute. But it is contended by the learned counsel of the respondent that inasmuch as the constitution of that state created this liability without providing any special remedy or method of enforcement, it may be enforced by the usual remedies for the enforcement of any such general liability. The constitutional provision is that "the stockholders of all corporations and joint-stock associations shall be individually liable for all labor performed for such corporation or association." It was held in *Hanson v. Donkersley*, 37 Mich. 184, that this liability is not primary but collateral, and in a suit under the statute the statutory conditions must be fully complied with; and in *Peck v. Miller*, 39 Mich. 594, it was held that, if the constitutional provision is sufficient to execute itself, it can be only by some proceeding in equity, but that there is no remedy at law to do complete justice in such a case without some aid of statutes. In *Morley v. Thayer*, 3 Fed. Rep'r, 737, it is held by Judge Clifford that a similar constitutional provision of Massachusetts could not execute itself, and required legislation to carry it into effect, by prescribing the means and mode of its enforcement, and that it is clear that the statutes passed in fulfillment of that requirement constitute the unmistakable rule of decision, and furnish the only basis of judicial action. To the same effect are *Fusz v. Spaunhorst*, 67 Mo. 256; *French v. Teschemaker*, 24 Cal. 518; and *Groves v. Slaughter*, 15 Pet. 449. It is inconceivable how any remedy could be effectual without the aid of statutory provisions. But the plaintiff is estopped from so claiming by his complaint, that predicates the action on the statutory liability, and refers to the statutory proceedings of the corporation by which the liability was incurred. The action is brought under the statute, and, as a

matter of course, the statute must be complied with. The remedy provided by the statute is exclusive of all others. "The statute which creates it (the corporation) may also declare the purpose of its creation, and provide for the manner of its enforcement." Pollard v. Bailey, 20 Wall. 520. "Where the statutes of the state which creates a corporation, making the stockholders liable for the corporate debts, provide a special remedy, the liability of a stockholder can be enforced in no other manner." Bank v. Francklyn, 120 U. S. 747; 7 Sup. Ct. Rep'r, 757. "Where the statute prescribes expressly the form of the remedy it is the well-established rule that that remedy was intended by the legislature to exclude every other, and it must be strictly pursued." Cook Stocks, § 220, and cases cited. In the same section (35) of the above statute, it is provided that "suit for such labor may be commenced against any or all the stockholders and the corporation jointly; but no levy shall be made upon the property of stockholders under an execution issued upon such judgment until the property of the corporation shall have been exhausted, and the clerk of the court issuing such execution shall indorse thereon a direction to the officer to that effect." Section 22 provides, after making it lawful for such corporation to do business in any other place in the United States, that "any such corporation shall be subject to the laws of this state, in regard to corporations, so far as the same shall be applicable to corporations formed under this act." The remedy is by action in *assumpsit*, and this is exclusive of all other remedies. It is the only action applicable. "The stockholders shall be individually liable for all labor performed." What other action is appropriate? The labor claim is unliquidated, and, therefore, debt will not lie. The remedy by *assumpsit* is ample and adequate, and, therefore, a suit in equity will not lie. There must be a judgment in an action at law to be enforced by execution after the property of the corporation is exhausted. The judgment must be against the corporation and stockholders jointly, and so also the execution with the clerk's indorsement thereon, to first exhaust the property of the corporation. The fact that the corporation is insolvent, and its property sold, can make no difference. The statute makes no such exception, and it must appear that its property is exhausted, by return to that effect on the execution, before taking the property of the stockholders. This ac-

tion is nominally in equity, but no relief of an equitable nature is demanded, and it finally resulted in a judgment at law to be enforced by execution. It is held in *Thompson v. Jewell*, 43 Mich. 240; 5 N. W. Rep'r, 274, that the action must be brought against the corporation and stockholders jointly, and that the word "may" in the statute is permissive and optional only as to the number of the stockholders, as "any or all." In *Milroy v. Mining Co.*, 43 Mich. 231; 5 N. W. Rep'r, 287, it is held that such remedy is exclusive, and that the corporation must be joined in every case. There is yet another restriction of the remedy. In section 37 it is provided that "personal actions against said corporations shall be commenced only in the county where the mine or smelting or other manufacturing works are situated, or in the county where the business office in this state is located." In *Arno v. Circuit Judge*, 42 Mich. 362; 4 N. W. Rep'r, 147, it is held that the legislature had the right to place this restriction on the venue of the action, and that when the suit is brought in the wrong county it may be disposed of on "plea in abatement or motion," as in *Haywood v. Johnson*, 41 Mich. 598; 2 N. W. Rep'r, 926. It follows, therefore, that this action is not properly brought. It is in equity, when it should be in *assumpsit*. It is brought against stockholders alone, when it should be against them and the corporation jointly.

2. The courts of this state have no jurisdiction in such a case, and it is confined to the courts of the state of Michigan, under whose laws the corporation was created, and by which it is governed. There are two reasons in the act itself why this is so: (1) No jurisdiction can be obtained to render a personal judgment against the corporation any where else; (2) actions are limited to a particular place in that state. But it is a principle of law, that does not appear to be questioned, that, where a special remedy against stockholders is prescribed by the statute under which the corporation is formed, it must be enforced in the courts of that state exclusively. Note to *Thompson v. Bank*, 19 Nev. 103; 7 Pac. Rep'r, 68. Where the act requires judgment to be first obtained, and execution to be first issued against the corporation, and its property exhausted, it is contemplated that such judgment must be obtained, and the execution issued, in the state in which the corporation exists. *Bank v. Bliss*, 89 N. Y. 338; *Dean v.*

Mace, 19 Hun, 391. Where the liability and the remedy against stockholders are statutory they are confined in their operation "to the limits of the sovereignty creating the corporation, and without extra-territorial force or obligation." *Lowry v. Inman*, 46 N. Y. 119. "A remedy given by the statutes of another state to creditors of a corporation against its stockholders is not available in the state of New York." *Christensen v. Eno*, 106 N. Y. 97; 12 N. E. Rep'r, 648. In *Nimick v. Iron-Works Co.*, 25 W. Va. 184, it is held that, under a similar statute as to the liability of stockholders of the state of Ohio, the corporation is a necessary party, and that the remedy must be pursued in the courts of that state. "A creditor of a corporation established in New Hampshire, the stockholders of which are individually liable for its debts under the statutes of that state, * * * cannot maintain a bill in equity * * * to enforce his claim against the stockholders [in Massachusetts] although some of them live here." *Erickson v. Nesmith*, 4 Allen, 233. Jurisdiction in such a case cannot exist outside of the state where the corporation was created, because it cannot be obtained over the corporation, which is a necessary party. *Patterson v. Lynde*, 112 Ill. 196. It is not necessary to cite more cases. The principle would seem to be self-evident. We hold, therefore, that this action is not properly brought, nor brought within the proper jurisdiction.

The judgment of the circuit court is reversed and the cause remanded, with direction to dismiss the complaint.

Enforcing the statutory liability of resident stockholders in foreign corporations.—It may be laid down as a general proposition, that a general liability of any sort created by the statutes of a state or arising by virtue of such statutes against the stockholders of a corporation, and not penal in its nature and not limited to any particular remedy, may be enforced in any jurisdiction where the stockholder may be found. *Paine v. Stewart*, 38 Conn. 516; *Drinkwater v. Portland Marine Ry.*, 18 Me. 35; *Hodgson v. Cheever*, 8 Mo. App. 318; *Manville v. Edgar*, 8 Mo. App. 324; *Aultman's Appeal*, 98 Penn. St. 505; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. (S. C.) 225; *Flash v. Conn*, 109 U. S. 371; *Savings Bank Association v. O'Brien*, 51 Hun, 45; *Ex parte Van Riper*, 20 Wend. 614; *Perkins v. Church*, 31 Barb. 84; *McDonough v. Phelps*, 15 How. Pr. 373; *Tinkham v. Borst*, 31 Barb. 407.

As to when a statute imposing such liability is penal in its nature, so as to fall within the principle that one state will not enforce the penal laws of another, has been considered in a prior note. See *Cochran v. Wiechers*, ante, and note. The cases there cited recognize the general rule above stated and

treat statutes of a penal nature as forming an exception to that rule. But if the statute creating the liability also provides some special and peculiar remedy or method of enforcing the liability, then such liability can only be enforced in the manner provided, and if the remedy is one which cannot be applied in a foreign state or which cannot be applied without injustice to the citizens of the foreign state, then the latter will decline to enforce it. *Erickson v. Nesmith*, 15 Gray, 221; *Erickson v. Nesmith*, 4 Allen, 233; *Erickson v. Nesmith*, 46 N. H. 371; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Taft v. Ward*, 106 Mass. 518; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114; *Lowry v. Inman*, 46 N. Y. 119; S. C., 4 Am. Corp. Cas. 549; *Jessup v. Carnegie*, 80 N. Y. 441; *Christensen v. Eno*, 106 N. Y. 97; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *Fourth National Bank v. Franklyn*, 190 U. S. 747; *Patterson v. Lynde*, 112 Ill. 196.

The statutes of New Hampshire imposed a personal liability upon the stockholders of corporations and provided that such liability should be enforced "by a bill in chancery and not otherwise." It was held that a suit at law would not lie in Massachusetts against a stockholder residing in the latter state to enforce such liability. The court says:

"The liability on which the present action is founded is created solely by the statutes of the state of New Hampshire, and no proceedings could be there had to enforce it except by bill in chancery. That this remedy is more beneficial in its operation, and will work less hardship on parties liable as stockholders for the debts of a corporation than an action at law, cannot be doubted. It compels the party seeking to enforce it to join in the suit all the parties in interest who can be affected by the decree; it avoids multiplicity of suits, apportioning the liability among all the stockholders, and in the same suit which charges the stockholders, decrees a contribution from each stockholder of their respective shares of the general burden. *Hadley v. Russell*, 40 N. H. 109. But by an action at law each creditor of the corporation may, as is attempted in the case at bar, pursue his separate remedy against an individual stockholder, compel him to pay the entire debt, and place on him the burden of obtaining contribution from those equally liable with himself. It is, therefore, clear that the plaintiffs in this action seek to enforce against the defendant a liability, created by the statutes of a foreign state, by a remedy denied to them in the courts of that state, and which operates with greater hardship on our citizens than the remedy provided by the statute itself, and which alone they could pursue in that jurisdiction. Nor is this all. If the plaintiffs were seeking to enforce a similar liability under a statute enacted by the authority of our own state, the same in terms with that existing in New Hampshire, it is clear that they could not maintain this suit at law, but must resort to a bill in equity, upon the well-settled principle, that when a statute creates a right and prescribes a remedy, that remedy is exclusive and no other can be pursued.

"The county which requires us, in the exercise of a judicial discretion, to give effect to foreign statutes here, will be sufficiently satisfied by allowing parties, in a case like the present, to use in our courts the same remedy so far as it is available, as that prescribed by the same statutes to persons enforcing their rights in the jurisdiction of the state that enacted the statute; but it does not require us to afford that remedy, operating hardly on our citizens, which

is denied to persons in the foreign jurisdiction, and which would not be allowed to them in seeking to enforce a similar right under our own laws." *Erickson et al. v. Nesmith*, 15 Gray, 221, 223.

Afterward a suit in equity was commenced between the same parties and the same court held that that also would not lie. The reasoning of the court appears from the following extract:

"The further inquiry is, whether a liability of this character, fixed upon the stockholders of a manufacturing corporation wholly by the statutes of New Hampshire, the mode of enforcing it, or the remedy, being found wholly in such foreign statute, can be properly enforced in this state against one or more of our citizens who may have become stockholders in such foreign corporation. When the statute confers a right and prescribes a remedy, that particular remedy and that only can be pursued. The only remedy given by the statute of New Hampshire is by a bill in equity. Such a bill as it seems by the decision of the court of that state in *Hadley v. Russell*, 40 N. H. 109, means a bill in behalf of all the creditors; and against all the stockholders. This was so assumed in the opinion of this court in the former case between these parties. In *Knowlton v. Ackley*, this court in denying an action at law, and suggesting the remedy by bill in equity, seem to assume that the bill will be against all the stockholders, and for the benefit of all the creditors.

"If this be so, we perceive at once strong reasons why such a bill should be brought in the state which created the corporation, and where the same is located by the express terms of its charter, and where its place of business is. The effect of maintaining such a bill is to draw before the court all the creditors of the corporation, all the stockholders, and, necessarily, as we should suppose, the principal debtor, the corporation itself. The fact of the residence of a single stockholder in Massachusetts, who might be liable in a New Hampshire corporation in common with a hundred stockholders residing there, would upon the hypothesis transfer to our jurisdiction all such stockholders and all the creditors, and authorize us to hear and adjust all conflicting questions as to the indebtedness of the corporation, who were stockholders, and what were the equities between them.

"Great practical difficulties meet us at once. There are strong reasons for holding that, in case of an existing corporation, the debt sought to be recovered of a stockholder should be first established by a judgment of court. If this be doubtful, it is at least necessary that before such debt be established by the proceedings in the bill in equity, the corporation should have been made a party to the bill. *Bogardus v. Rosendale Manuf. Co.*, 3 Seld. 151. But we have no jurisdiction that will reach such corporation out of this commonwealth, and having no assets here, and the same is true of the stockholders residing in New Hampshire. A bill in equity in Massachusetts is, therefore, not the remedy intended to be prescribed by the statute of New Hampshire creating and regulating the liability of stockholders in a manufacturing corporation in New Hampshire." *Erickson et al. v. Nesmith et al.*, 4 Allen, 233, 136-7.

This conclusion of the Massachusetts court is apparently approved by the New Hampshire court in a suit in that state between the same parties. *Erickson v. Nesmith*, 46 N. H. 371.

In *Lowry v. Inman*, 46 N. Y. 119, the suit was brought in New York to recover against a stockholder of a Georgia banking corporation. The nature of the statute in question and the conclusions of the court are shown by the following quotation from the opinion :

"The provision touching the liability of corporators, for the debts of the corporation, is found in the eighteenth section of the charter, which is devoted to that subject. It does not, in terms, declare that stockholders shall be individually or personally liable for the debts of the corporation. It first declares that none but citizens of the state shall subscribe for, or own, or purchase stock in the bank. The act did not contemplate a necessity for any obligation or liability of extra-territorial force. It then enacts, that the private or individual property of each stockholder, shall be liable for the redemption of the bills, etc., and in the same sentence proceeds to dictate the circumstances and conditions under and upon which, as well as the particular process by which, the liability shall be enforced, and the property of the stockholders subjected to the payments of the debts of the bank, to-wit, by an execution upon a judgment against the bank. In a subsequent clause of the same section, provision is made for the use and control of the same process, to do equity between the stockholders, and compel a ratable contribution from all. The act provided, as the appropriate remedy, that a judgment and execution against the corporation should be a lien upon, and be enforced against, the individual property of the stockholders made liable by the act. It, in terms, made the property liable upon a judgment and execution against the bank, to which the stockholders were not parties, and the property was not made liable in any other way or by any other process. It is very evident that an independent action would not lie in Georgia against the stockholders of this corporation, for the obvious reason, that an adequate remedy is provided by this act, without action, and if not, then it cannot be maintained elsewhere. The act only charges and binds the property of the stockholder by subjecting it to execution in satisfaction of a judgment against the bank, and makes the same process do equity between all the stockholders ; and this cannot be done by any other process or by the courts of any other state.

"The remedy is necessarily confined to the sovereignty of Georgia, and can have no recognition or effect beyond the boundary of that state. The charter creates no right and imposes no obligation disconnected with the prescribed remedy, which is local in its character, and not capable of being enforced without the state of Georgia. A foreign tribunal cannot enforce it." *Lowry v. Inman*, 46 N. Y. 119, 129-130.

"In all the diversity of opinion in the courts of the different states," says the supreme court of the United States, "upon the question how far a liability, imposed upon stockholders in a corporation by the law of the state which creates it, can be pursued in a court held beyond the limits of that state, no case has been found, in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders." *Fourth National Bank v. Francklyn*, 120 U. S. 747, 758.

If the statute simply gives the ordinary remedy by action for enforcing a common-law liability, it will be enforced any where according to the appropriate remedy of the state where the action is brought. *Ex parte Van Riper*, 20 Wend. 614; *Nimick v. Mingo Iron Works*, 35 W. Va. 199.

The liability of stockholders in a corporation created by a foreign state is in all cases to be determined by the laws of such state. *New Haven Horse Nail Co. v. Linden Spring Co.*, 143 Mass. 349, 353; *Second National Bank v. Hall*, 35 Ohio St. 158; *Nimick v. Mingo Iron Works*, 35 W. Va. 184, 199; *First National Bank v. Gustin Minerva Mining Co.*, 1 Am. R. R. & Corp. Rep. 272. In the last case the court say :

"It is elementary law that, where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all the laws of the state under which the corporation is organized and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in this state, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear, both upon principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon right to enforce in another jurisdiction a contract validly entered into. The remedy, however, does not enter into the contract itself; and for this reason the individual liability of shareholders can only be enforced by the remedies provided by the laws of the forum. Hence the question of the liability of the defendant shareholders must be determined by the laws of Dakota, and that of remedy by the laws of Minnesota." *First Nat. Bank v. Gustin Minerva Min. Co.*, 1 Am. R. R. & Corp. Rep. 272, 173.

In construing the statutes of another state imposing a liability upon stockholders the decisions of such state will be controlling. *Flash v. Conn*, 109 U. S. 871; *Jessup v. Carnegie*, 80 N. Y. 441; *Sackett's Harbor Bank v. Blake*, 8 Rich. Eq. (S. C.) 225; *Savings Association v. O'Brien*, 51 Hun, 45.

HILL v. MERCHANTS' MUTUAL INSURANCE COMPANY.

(10 Sup. Ct. R. 599; 134 U. S. 515.)

1. CONSTITUTIONAL LAW. CHARTER AS A CONTRACT. An act which provides that where an execution has been issued against a corporation and no property can be found upon which to levy it, the same may be issued against any stockholder to the amount unpaid on his stock, provided such execution should not issue without an order of court and sufficient notice in writing to the person to be charged, does not violate any contract with the corporation or the state, created by a subscription made prior to the passage of the act.

2. CHANGE OF REMEDY. Such an act imposes no additional liability but simply gives a new remedy.

8. CALL OF DIRECTORS, WHEN NOT A PREREQUISITE. Though the charter provides that all of the subscriptions over \$10 per share shall be payable on the call of the directors, yet where the subscriber has given demand notes for the amount unpaid he may be made amenable to the act.

THIS writ of error brings up for re-examination a judgment of the supreme court of Missouri, and presents the question whether a certain statute, to which that judgment gave effect, impaired the obligation of a contract arising out of a subscription by Britton A. Hill to the stock of an insurance company created by the laws of Missouri.

By the second section of an act of the Missouri legislature, approved March 3, 1857, creating the Washington Insurance Company, it was provided, in reference to subscriptions to its stock, that "at the time of subscribing there shall be paid on each share \$1 and \$9 more within twenty days after the first election of directors. If any stockholder fails to make such payment, such stockholder shall forfeit the amount paid on such stock at the time of subscribing. The balance due on each share shall be subject to the call of the directors, and the said company shall not be authorized to make any policy or contract of insurance until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand by approved notes or mortgages on real estate." The same act contained the following provisions: "This act shall be, and the same is hereby declared, a public act, and the same shall be deemed and construed as such; and the corporation established by this act shall be, and the same is hereby, exempted from the operation of sections 7, 13, 14, 15, 16 and 18 of article first of the act entitled 'An act concerning corporations,' approved November 23, 1855; and said sections shall be deemed as repealed, so far as the same concerns the corporation hereby established. Laws Mo. 1856-57, pp. 544, 545, §§ 2, 8.

Sections 7, 13, 14, 15, 16 and 18 of the above act of 1855, from the operation of which the Washington Insurance Company was thus exempted, are as follows:

"§ 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

"§ 13. In all corporations hereafter created by the legislature, unless otherwise specified in their charter, in case of deficiency

of corporate property, or estate liable to execution, the individual property, rights and credits of every member of the copartnership, or body politic, having a share or shares therein, shall be liable to be taken on execution, to an additional amount, equal to that of the amount of his stock, and no more, for all debts of the corporation contracted during his ownership of such stock; and such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof on the books of the corporation, and for the term of six months after judgment recovered against such corporation, in any suit commenced within the year aforesaid provided, that in every such case the officer holding the execution shall first ascertain and certify upon such execution that he cannot find corporate property or estate.

"§ 14. In such case, the officer may cause the property of such stockholder to be levied upon by execution in the same manner as if the same were against him individually, after giving him forty-eight hours' previous notice of his intention, and the amount of the debt or deficiency, if he resides within the county, or, if not within the county, to his agent, if he have any within the county; otherwise to the clerk or cashier or some other officer of the corporation, unless such stockholder, his agent, or the clerk or other officer, on demand and notice as aforesaid, shall disclose and show to the execution creditor, or the said officer, corporate property or estate subject to execution sufficient to satisfy said execution and all fees.

"§ 15. Such creditor, after demand and notice as mentioned in the preceding section, at his election, may have an action against any such stockholder or stockholders, on whom such demand and notice may have been served, jointly or severally, or so many of them as he may elect, to recover of him, or them, individually, the amount of his execution and costs, or of the deficiency as aforesaid, not exceeding the amount of the stock held by such stockholder or stockholders.

"§ 16. The clerk, or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names, places of residence (so far as to him known), and the amount or liability of every person liable as aforesaid."

"§ 18. Every corporation hereafter created shall give notice annually in some newspaper printed in the county where the corporation is established, and in case no paper is printed therein, then in the nearest paper, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and, if any of the said corporations shall fail so to do, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given." R. S. Mo. 1855, pp. 371-373.

By an act of the legislature of Missouri approved February 9, 1859, the Excelsior Insurance Company was created. That act is as follows:

"Section 1. That an insurance company be, and is hereby, established in the city of St. Louis, to be known by the name and style of the 'Excelsior Insurance Company,' the stockholders of which are hereby declared a body corporate and politic, with the same amount of capital stock and period of existence, and the same rights, privileges and restrictions, as were conferred upon the 'Washington Insurance Company' of St. Louis, by an act of the general assembly of the state of Missouri approved March 3, 1857, with the exception of so much of section 8 of said act as declares the same a public act, and exempts said corporation from the operation of section 18 of article 1 of the act, entitled 'An act concerning corporations,' approved November 23, 1855.

"§ 2. James H. Lucas, Henry L. Patterson, Thomas Sterin, Morris Collins, James G. Brown and John C. Porter, or any three of them, or such person or persons as they may appoint, are hereby constituted commissioners to open books for subscription to the capital stock, in the same manner as is prescribed in the charter of said Washington Insurance Company. This act to take effect from and after its passage." Sess. Acts. Mo. 1859, p. 74.

Section 6, article 8, of the constitution of Missouri, which went into effect in 1865, provides as follows: "Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock."

In order to give effect to this constitutional provision, the legislature, by an act which went into effect March 19, 1866, amended section 13 of the above act of 1855, so as to read as follows:

"§ 11. If any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; provided always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion such court may order execution to issue accordingly." Gen. Stat. Mo. 1866, p. 328.

In July, 1866, Hill subscribed for sixty-four shares, of the par value of \$100 for each share, of the stock of the Excelsior Insurance Company, paying part cash, and giving to the company four notes, for \$750 each, dated, respectively, July 20, 1866, and one note dated July 11, 1866, for \$1,800. Each one of these notes was payable on demand to the order of the insurance company. At the commencement of these proceedings his stock had become reduced to thirty-seven shares.

The constitution of Missouri of 1875 provided that "dnes from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her." Art. 12, § 9.

In 1879, the statutes of Missouri were revised, and the above section of the act of 1866 was amended so as to read as follows:

"§ 736. If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned; provided always, that no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the per-

sons sought to be charged, and upon such motion such court may order execution to issue accordingly ; and provided, further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned."

The present action was brought under the statute last quoted. It was commenced by notice to Hill on behalf of the Merchants' Mutual Insurance Company that it would move the circuit court of the city of St. Louis for execution against him, as a stockholder of the Excelsior Insurance Company for the balance unpaid upon his thirty-seven shares of the capital stock of the Excelsior Insurance Company. The proceeding was docketed as a suit against that company by the Merchants' Insurance Company. Hill appeared, and upon the trial of the action the court found that the unpaid balance on said shares was \$2,127.50. For that amount, with costs, an execution was directed to be issued against Hill. Upon appeal to the St. Louis court of appeals that judgment was affirmed, and the judgment of the court of appeals was affirmed by the supreme court of the state. 12 Mo. App. 148 ; 86 Mo. 466.

G. M. Stewart for plaintiff in error. *E. W. Pattison* for defendant in error.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The plaintiff in error contends that the act creating the Excelsior Insurance Company was a private act, and its charter exempted from alteration, suspension or repeal by subsequent legislation ; that its stockholders were exempted from the levy of an execution upon their individual property at the instance of a judgment creditor of the corporation in case of a deficiency of corporate property, and from actions at law by creditors ; that the rights of its stockholders were not affected by subsequent legislation of a general nature ; and that the method of collecting unpaid stock, specially provided for in the company's charter, was exclusive of any other remedy, except that supplied by a court of equity.

The assignment of error which gives this court jurisdiction to re-examine the judgment of the state court is that when the testator of the plaintiff in error purchased the stock of the Excelsior Insurance Company he entered into a contractual relation,

not only with the company, but with the estate, both as to the method of paying for his stock, and in respect to the extent of his liability; and that the rights vested in him by the contract were taken away, and, therefore, the obligations of his contract were impaired by the legislation of 1879, the validity of which was sustained by the court below.

We assume, in conformity with the decision of the supreme court of Missouri — and that view is favorable to the plaintiff in error — that the Excelsior Insurance Company was not subject to the seventh section of the general statute of November 23, 1855, declaring that the charters of all corporations thereafter created should be granted subject to alteration, suspension and repeal, in the discretion of the legislature; and that the other sections of that statute, specially named in the charter of the insurance company, were to stand as repealed so far as that company was concerned. The result of this construction of the charter of the insurance company is that prior to the passage of the act of 1866, which took effect March 19, 1866, no specific remedy was prescribed for creditors seeking to reach the unpaid subscriptions of stockholders. But it was open to them to proceed by a suit in equity. That such a remedy could be used without violating any provision of the company's charter, or any right of a stockholder cannot be doubted. But neither the company nor its stockholders had any vested right in that particular remedy. They could only insist that the extent of their liability should not be increased. The act of 1866 authorized an execution to be issued against a stockholder "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon," where no property or effects of the corporation could be found. This statute, if given a retrospective operation, certainly did increase the liability of those who became stockholders in the Excelsior Insurance Company prior to its passage. But the defendant in error contends that it was applicable to all who, like Hill, became stockholders after its passage. Waiving any consideration of this question, it is certain that the act of 1879, under which this action was instituted, did not increase Hill's liability. He was liable, by virtue of his original subscription and by his notes to the company, to pay the whole amount of his subscription. The statute of 1879 did not enlarge

this liability, for it authorized an execution against a stockholder, where there was no corporate property to be levied on, only "to the extent of the amount of the unpaid balance of such stock by him or her owned." While, under the original charter of the company, he was liable to a suit in equity, under the statute of 1879 he was liable to be proceeded against by notice and motion in the action in which judgment was rendered against the corporation. In either mode he had opportunity to make defense.

It is, however, contended that under the charter of the company the stockholder was not bound to pay any amount beyond \$10 on each share, except upon a call of the directors, and that the provision allowing an execution for the unpaid balance, pursuant to the judgment of the court, was a change of the contract. The provision in the company's charter, that "the balance due on each share shall be subject to the call of the directors," did not give the stockholder the right, as between himself and the company, or as between him and the company's creditors, to withhold payment of the balance due from him until the necessities of the company required payment in full for the shares subscribed. The company was forbidden to make any policy or contract of insurance "until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand, by approved notes or mortgages on real estate." Hence Hill executed demand notes, with surety, for the entire balance due on his original subscription. The authority of the company to call for the payment of those notes, by installments, did not give him a right, as a part of his contract, to make payment in that particular mode. His undertaking was to pay each and all of his notes on demand, and it was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf — such remedy not increasing the debtor's liability. As said by this court in *Insurance Co. v. Needles*, 113 U. S. 574, 580; 5 Sup. Ct. Rep'r, 681, the condition is implied in every grant of corporate existence that "the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and

serve only to secure the ends for which the corporation was created."

Upon the point made by the plaintiff in error, that under the original charter of the company Hill was liable only to a suit in equity, to which all the stockholders could be made parties, and in which he could compel contribution from other stockholders, whereas under the statute of 1879 he could be proceeded against alone, it is sufficient to say that, if neither the statute of 1866 nor that of 1879 had been passed, he could have been sued at law upon the notes he gave the company. The proceeding authorized by the statute of 1879 is, in effect, a suit upon his notes for the amount due thereon. His liability to pay that amount has no such connection with the liability of other stockholders as to exempt him from a suit at law to compel him to pay the sum he agreed to pay. *Hatch v. Dana*, 101 U. S. 205. The statute restricts any judgment against him to the amount he originally assumed to pay. Consequently no substantial right of his has been violated. "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract." *Bronson v. Kinzie*, 1 How. 311, 316; *Sturges v. Crowninshield*, 4 Wheat. 122, 200; *Bank v. Francklyn*, 120 U. S. 747, 755; 7 Sup. Ct. Rep'r, 757, and cases there cited.

Judgment affirmed.

See *Coppage v. Hutton*, post; *Masonic Temple Ass. v. Channell*, post.

BARRICK V. GIFFORD.

(24 N. E. R. 259; — Ohio St. —.)

1. **INSOLVENT CORPORATIONS. WHEN ACTION AGAINST STOCKHOLDER ACCRUES.** Where a corporation, possessed of property subject to levy and sale on execution, though not sufficient to pay all its debts, continues to transact its business, the right of a creditor to enforce the statutory liability of its stockholders does not accrue until an execution, issued upon a judgment against it, has been returned unsatisfied for want of goods whereon to levy.

2. **EFFECT OF ASSIGNMENT FOR BENEFIT OF CREDITORS.** Where, however, a company has become insolvent, and made an assignment of all its property for the benefit of its creditors, the right of the creditors, or any of them, then

accrues to commence suit against the stockholders on their liability under the statute, without any prior proceeding against the company, and the statute of limitations begins to run from that time against the right of action.

3. **SUIT BY ONE CREDITOR ON BEHALF OF ALL SAVES THE BAR OF THE STATUTE AS TO ALL.** A suit commenced by one creditor on behalf of himself and all other creditors of an insolvent corporation to enforce the statutory liability of its stockholders is in the nature of a demand for all, and saves the running of the statute of limitations as against all the creditors who may come in and assert their claims before the final determination of the action.

4. **WHAT STOCKHOLDERS LIABLE.** The owners of the stock in an insolvent corporation, who are such at the commencement of a creditor's suit against its stockholders upon their individual liability, are liable for its debts; and this rule is not varied, in favor of a particular stockholder, by the fact that his stock may have been issued to him by the company after the creation of the debts.

THIS was a suit in the nature of a creditor's bill against the Sunday Creek Coal and Iron Company for the purpose of reaching unpaid stock subscriptions and enforcing the statutory liability of its stockholders. Gifford was a defendant but filed a cross-petition seeking the same relief as the original plaintiff. From a decree in favor of Gifford certain of the stockholders appealed.

J. Buckingham for plaintiff in error. *J. R. Davies* for defendants in error.

MINSHALL, C. J. A number of errors are assigned, which, so far as they arise upon the record, we will proceed to notice.

1. It is first claimed that the action of Gifford against the stockholders on their statutory liability was barred by the statute of limitations. There is no question as to the period of the limitation. The liability is one created by statute and must, therefore, be commenced in six years from the time it accrues. § 4981, R. S.; *Hawkins v. Furnace Co.*, 40 Ohio St. 507. It is then necessary to determine—First, when the right of action of Gifford against the stockholders accrued; and, second, whether it was commenced in the requisite time thereafter. The action of the coal and iron company was commenced October 10, 1878. It was an action by it as a creditor, "on behalf of itself and all other creditors of the Sunday Creek Coal and Iron Company," against the company and its stockholders. Gifford was made a party, and the prayer was that an account be taken of the amount

due it "and the other creditors of said insolvent company." Gifford's claim was based upon the right to the return of certain bonds, belonging to him, in the possession of the company. He demanded a return of the bonds June 15, 1874. The bonds not being returned, he afterward commenced suit against the company in the common pleas of the county, and at the January term, 1881, recovered a judgment thereon for the sum of \$8,863.05, for the conversion of the bonds. Thereafter, on August 30, 1881, he, by leave of the court, filed his answer and cross-petition in this suit, setting up the recovery of his judgment, and his right as a creditor of the coal and iron company to resort to the statutory liability of its stockholders for the satisfaction of the same. He also, as a first cause of action, averred the existence of certain unpaid subscriptions to the capital stock of the company, and asked that they should be first applied to the payment of his claim. This was found against him by the court, and no recovery was allowed him thereon. So that all the questions on error arise upon the cause of action against the stockholders upon their statutory liability.

Issues of fact were made by the answer of the plaintiff in error, Barrick, and other stockholders, and the replies of Gifford thereto. These issues were all found in favor of Gifford. So that it appears from the record (1) that he was delayed in the recovery of his judgment against the company by the opposition of Barrick and other stockholders; (2) that on December 23, 1876, the company became insolvent, and made an assignment of all its property for the benefit of its creditors; and (3) that up to this time it was the legal and equitable owner of a large amount of unincumbered property, subject to levy and sale on execution, amounting in value at times to more than \$100,000, and at no time to less than \$20,000. The liability of the stockholders under the statute is not a primary resource of the creditors. *Wright v. McCormack*, 17 Ohio St. 86. And it follows as a corollary from this that, as a general rule, it can only be resorted to after the assets of the company have been exhausted. "This rule," says Mr. Cook, who has made this subject a special study, "is based upon the principle that the liability of the shareholder is not a primary resource of corporate creditors, and is not, therefore, to be resorted to if the assets of the corporation, including the assessments on the stock

enforceable at common law, will suffice to pay the debts." Cook Stocks, § 221. See, also, to the same effect, *Thomp. Liab. Stockh.*, §§ 312, 313, 324.

But this rule does not require that, in all cases, a judgment must be recovered against the corporation, and an execution issued and returned "no goods," before the creditor has the right to proceed against stockholders on their statutory liability. The law does not require the doing of a vain thing, and, therefore, where the company has become wholly insolvent, has ceased to do business, and assigned all its property to a trustee for the benefit of its creditors, the suit to enforce their statutory liability may be commenced against the stockholders by the creditors, without any of them first recovering a judgment against the company, and having an execution issued and returned unsatisfied. *Morgan v. Lewis*, 46 Ohio St. 1; 17 N. E. Rep'r, 558; *Thomp. Liab. Stockh.*, § 324.

But it is claimed on the authority of *Hawkins v. Furnace Co.*, 40 Ohio St. 507, that insolvency, in the sense that the company is indebted in a sum greater than its assets, is sufficient, and that the right of action in favor of creditors against stockholders upon their statutory liability then accrues, although the company is possessed of property subject to levy and sale on execution, and continues to do business. We do not so understand this case. The question in the case arose upon a demurrer to the petition, which simply averred that "in the course of its business the company became largely involved in debt, and became insolvent in the year 1860." And it is said in the opinion by Martin, J.: "Whether a judgment creditor only can, in analogy to a creditor's bill maintain the action, is a question that has not been argued before us, and upon which we express no opinion. The theory of the petition is that when the company is insolvent and the debt is due the action accrues. This theory is the more favorable one for plaintiff in considering the demurrer, and we adopt it." Now, it is plain that what is here meant is that the court adopts the theory of the plaintiff as the one most favorable to him on the demurrer to his petition, and not that it adopts it as the true rule in determining when the cause of action accrues. If, however, by the term "insolvent," as used in this case, is simply meant the want of assets by a corporation sufficient to pay all its debts, notwith-

standing it has property subject to levy and sale on execution, and continues to do business, then it is not approved. Such a rule would be not only uncertain, but deceptive, to the creditor. The right to commence the action would be a matter of speculation. It could not be determined, before bringing the action and taking an account, whether the company was indebted in a sum greater than its assets would pay or not. A rule of certainty, applicable to such cases, should be adopted. The true rule, and that which is usually adopted where the company has property and continues to do business, is to require the creditor first to obtain a judgment against the corporation, and cause an execution to be issued, and if it is returned not levied for want of goods, then the creditor has the right to commence suit against the stockholders upon their individual liability, and the statute of limitations begins to run against the right of action from that time, and not earlier. So long as the company is possessed of corporate property, and continues to transact its business, the stockholders should be regarded as estopped from averring that the right of action against them as individuals accrued, by reason of the insolvency of the company, at a period earlier than the return of an execution unsatisfied, issued upon the judgment of a creditor of the company. Stockholders have the means of knowing the condition of their company much better than creditors, and, if the company continues to do business upon an insolvent basis, it should be regarded as permitted by the stockholders, as the directors and officers of the company derive their authority from, and are the agents of, the stockholders. We, therefore, conclude that, in this case, the right of the creditors of the coal and iron company to sue its stockholders upon their statutory liability accrued, when the company made an assignment of all its property, and ceased to do business on December 23, 1876, and not earlier. *Thomp. Liab. Stockh.*, § 203.

2. The next question is, was it arrested by the commencement of judicial process, within the limitation of the statute? A suit in the nature of a creditor's bill is the proper proceeding to be adopted by creditors of an insolvent corporation seeking to enforce the statutory liability of its stockholders. *Umsted v. Buskirk*, 17 Ohio St. 113. And, when such suit is commenced, no creditor can acquire priority, or institute a separate suit for the

enforcement of such liability in his own behalf. *Wright v. McCormack*, 17 Ohio St. 86. So that it necessarily follows that the effect of commencing the suit by one creditor is to save the running of the statute of limitations, not only as against the claim of the one filing it, but also as against the claim of every creditor of the corporation who comes into the action before its final determination. And this is the general rule. "A bill filed by one creditor, as plaintiff, in behalf of himself and others, will prevent the statute from running against any of the creditors, who came in under the decree. Every creditor has, after the filing of a bill, an inchoate interest in the suit, to the extent of its being considered as a demand, and to prevent his being shut out, because the plaintiff had not obtained a decree within the six years." *Ang. Lim.* (8th ed.), p. 346, § 331. See, also, *Sterndale v. Hankinson*, 1 Sim. 393; *Brinckerhoff v. Bostwick*, 99 N. Y. 185; 1 N. E. Rep'r, 663; *Ang. Lim.*, § 167. "In such a proceeding," says *Morawetz*, "the proceeds of the liability of all the shareholders are regarded as a fund to be distributed ratably among all the creditors. Every creditor is entitled to come in and share in the distribution, whether he has previously obtained a judgment or not. Those creditors whose claims against the corporation are disputed may establish their claims before a master in chancery or referee, or in such other way as the court may direct." *Mor. Priv. Corp.*, § 884.

An examination of the amended petition of the iron company, filed April 1, 1881 (the original petition filed October 10, 1876, not being printed), shows that it was in fact a creditor's bill. It purported to be and was brought by the plaintiff "on behalf of itself and all other creditors of the coal and iron company," and asked for an account on behalf of itself "and the other creditors of said insolvent company." Hence, as *Gifford's* cause of action against the stockholders first accrued in 1876, it was not barred when the suit was begun. And this would be so, even if it were held that, as to him, it was not commenced until he filed his cross-petition, which was August 10, 1881.

3. It also claimed as a defense that, after the assignment by the company and the acceptance of his trust by the assignee, an agreement was entered into by the assignee, *Gifford*, and the other creditors, that the unpaid subscriptions, averred by *Gifford* in his first cause of action to be due, should not be collected or

required by the assignee to be paid; and that by reason of this agreement Gifford lost his right to enforce payment under the statutory liability, on the ground that he had thereby released a primary fund, and to which he might have resorted for the payment of his claim. We shall not consider the question of law intended to be raised by this defense, for the reason that there is no positive averment that there were any unpaid subscriptions to be collected. The judgment of the court was against Gifford on his first cause of action; in other words, it found against the existence of any such subscriptions; so that there was nothing to release by the alleged agreement, and the rights of the defendant were in no way affected thereby. In order to have raised the question, the defendant should have averred that there were such unpaid subscriptions, and that they were released by the agreement. But this has not been done.

4. It is also claimed that the court erred in sustaining a demurrer to the sixth defense of the defendant's answer. It reads as follows: "That two hundred of the four hundred shares of which the defendant in said second cause of action is alleged to be the owner had not been issued or sold by the said Sunday Creek Coal and Iron Company, nor was he the legal or equitable owner or holder thereof, at the time said last-named company assumed and agreed with said Sunday Creek Coal and Iron Mining and Transportation Company to pay and perform the said contract between said last-named company and said Gifford, but they were first sold and issued by the said Sunday Creek Coal and Iron Company several years after it so assumed to pay Gifford, but were so sold and issued before the said Gifford made his said demand for the return of the bonds of June 15, 1874. Wherefore, he says, he is not liable to said Gifford in respect of said last-named two hundred shares." The Sunday Creek Coal and Iron Company grew out of the prior company named in the defense, and seems to have acquired the property and assumed the obligations of that company. The obligation to Gifford in regard to these bonds was one of them. The bonds had been received from him as an accommodation, no consideration being paid for the loan. The obligation assumed by the bailee was to cut off the coupons as they matured, sell them, and remit the proceeds to Gifford, and return the bonds on thirty days' notice. The obligation arose *ex locato*,

and no liability beyond this accrued to Gifford as against the company until, upon demand, it refused to return the bonds, which was June 15, 1884; so that, as a matter of law and fact, the liability of the company for the conversion accrued to Gifford after Barrick became the owner of all his stock.

But in holding the facts pleaded insufficient to constitute a defense, we do not place our decision on this ground. While there are some resemblances between the stockholders of a corporation and the members of a partnership, there are few that are real, and no inferences can be drawn therefrom as to the rights of creditors against stockholders upon their individual liability. *Tayl. Corp.*, § 716. A new member of a firm is not, in the absence of agreement, liable for the debts of the firm contracted before he became a member. The addition of a new member makes a new firm. A change, however, in the stockholders of a corporation, has no legal effect upon its *status*. It remains, through all changes in the *personnel* of its stockholders, the same legal entity, possessed of the same rights, and subjected to the same liabilities. When one purchases stock in a corporation, he acquires a fractional interest in the capital stock and assets of the company, proportionate to the amount of his stock. If there is a surplus, he acquires an equivalent interest in it, and is entitled to dividends when they are earned; but, if there should happen to be a deficiency, the maxim applies, *qui sentit commodum sentire debet et onus*, and is, therefore, required to contribute his share to the discharge of the common burden. The application of this principle is not varied by the time when the owner acquired his stock. The right, with the correlative duty, is an incident of the stock. There is no difference, in this regard, between the opinion of the majority and that of the minority, in the case of *Brown v. Hitchcock*, 36 Ohio St. 667. In both it is held that the individual liability of stockholders to creditors is to be discharged primarily by those who are the owners of the stock at the time the right to assert it accrues. But in the opinion of the majority it was held that, in the case of the insolvency of an existing owner, a person from whom the insolvent existing owner obtained the stock by assignment, either mediately or immediately, may be made liable for such debts as may have been contracted while he remained owner — the minority holding that the obligation attached exclusively to those who

are holders of the stock at the winding up of the company, or when the right is asserted by creditors.

If, then, an existing stockholder is solvent, it is immaterial, so far as his liability to creditors is concerned, when he became the owner of his stock, or from whom he acquired it. As such stockholder, he is individually liable for the debts of the company to the extent limited by the statute. Such liability attached to every share of stock issued by a company. The stock and the liability go together, so that whoever owns the stock must sustain the burden when the company becomes insolvent. The plaintiff in error relies upon *Bonewitz v. Bank*, 41 Ohio St. 78. No such question arose in that case. All that was there decided is that a finding that two of the stockholders did not own stock at the time the indebtedness of the plaintiff accrued did not authorize a judgment in their favor releasing them from liability. This was right, and determined the question before the court. The additional remark, that, "if the finding had been that the stock they held when the action was commenced had not been sold by the corporation until after the debt of the plaintiff accrued, the judgment would have been proper," was simply a misleading statement, outside of the case, and no way necessary to its determination.

Judgment affirmed.

Liability of stockholders.— We refer to the following cases in these reports touching the liability of stockholders in corporations: *Whitehill v. Jacobs*, 1 Am. R. R. & Corp. Rep. 165; *First National Bank v. Gustin* Min. Co., 1 Am. R. R. & Corp. Rep. 272; *Schrader v. Manufacturers' National Bank*, 1 Am. R. R. & Corp. Rep. 350; *Hand v. Cale*, 1 Am. R. R. & Corp. Rep. 340; *Libbey v. Tobey*, ante, p. 281; *Howell v. Roberts*, ante, p. 365; *Wolverton v. Taylor*, ante, p. 369; *Cochran v. Weichers*, ante, p. 377; *Alling v. Ward*, post; *Masonic Temple Ass. v. Channell*, post; *Coppage v. Hutton*, post; *May v. Black*, ante, p. 673; *Hill v. Merchants' Mutual Ins. Co.*, ante, p. 682.

GEORGE H. HAMMOND & Co. v. HASTINGS.

(10 Sup. Ct. R. 727; 134 U. S. 401.)

1. CORPORATIONS. TRANSFER OF STOCK. LIEN OF CORPORATION. Where a corporation is organized under a public law which provides that the corporation shall have a lien upon all the stock or property of its members invested therein for any indebtedness of such members to the corporation, such law is

notice to the world, and a transferee of stock in such company will take it subject to any claim in favor of the corporation, whether he has actual knowledge or notice thereof or not.

2. CERTIFICATES OF STOCK NOT NEGOTIABLE. Certificates of stock are not negotiable either in form or character and whoever takes them does so subject to the equities and burdens attached thereto.

BREWER, J. On July 22, 1884, George O. Sweet was the owner of one thousand two hundred shares of the capital stock of a corporation organized under the laws of the state of Michigan, known as "George H. Hammond & Co.," as evidenced by two certificates of stock (which were alike in every thing, except numbers of shares and dates), of one of which, with indorsements, the following is a copy :

"George H. Hammond & Company.

"Capital stock, \$1,500,000. Shares, \$25 each.

Number 5.

Shares, 800.

"This is to certify that George O. Sweet is entitled to eight hundred shares, of \$25 each, of the capital stock of George H. Hammond & Company. Transferable only on the books of the company, in person or by attorney, on the surrender of this certificate.

"GEORGE H. HAMMOND, Pres't.

[Seal.] "JAMES D. STANDISH, Sec'y.

"Detroit, Mich., Jan'y 18, 1882.

"[Endorsed.]

"For value received — hereby sell, assign and transfer unto —, — shares of the within stock, and do hereby constitute and appoint — attorney to transfer the same on the books of the company.

"Witness my hand and seal this — day of —, A. D. 18—.

"———. [L. s.]"

These certificates had theretofore been pledged to the National Bank of Illinois, a bank located in the city of Chicago. On that day, in pursuance of the pledge, the stock was sold and purchased by the defendant in error, Thomas D. Hastings. During all the time that Sweet owned the stock he was indebted to the corporation George H. Hammond & Co. After his purchase Mr. Hast-

ings presented the certificates to the officers of the corporation and demanded a transfer. This was refused, on the ground that the corporation had a lien upon the stock for the amount of Sweet's indebtedness to it. Thereupon this action was brought.

George H. Hammond & Co. was a manufacturing corporation created in October, 1881, under the laws of the state of Michigan, with its principal office in the city of Detroit, Mich.; and Sweet was, during the time of these transactions, a resident of and doing business in the city of Chicago, selling the property of the corporation on commission. The law of Michigan under which manufacturing companies may be organized, and under which George H. Hammond & Co. was created and exists, has, since 1875, contained this provision (§ 4143, 1 How. Ann. St.; § 17, Act 187, Laws 1875): "The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation, in such form and manner as their by-laws shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein, for all debts due from them to such corporation." The general act (1 How. St. § 4866) provides, as to all corporations, that a transfer of stock shall not be valid except as between the parties, unless entered on the books of the company, showing the names of the parties, by and to whom transferred, the number and designation of shares, and the date of the transfer. The bank was ignorant of Sweet's indebtedness to the corporation when it lent its money on the security of the stock, and of course Hastings, though notified thereof at the time of the sale, succeeded to all the rights of the bank. On these facts the circuit judge held that the purchaser took the stock discharged of any lien, and submitted to the jury only the question of the value of the stock. This having been found by its verdict, judgment was entered therefor, and the corporation now alleges error. The single question is whether the corporation had a lien upon the stock for Sweet's indebtedness, as against the claims of the bank and the purchaser. This question must be answered in the affirmative; for the rule is clear and unquestioned that where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world. *Bank v. Laird*, 2 Wheat. 390; *Brent v. Bank*, 10 Pet. 596;

Bank v. Bank, 105 U. S. 217, 221; Rogers v. Bank, 12 Serg. & R. 77; Sewall v. Bank, 17 Serg. & R. 284; Presbyterian Congregation v. Bank, 5 Penn. St. 345, 348; Bank v. Iglehart, 6 Gill, 50; Reese v. Bank, 14 Md. 271; First Nat. Bank of Hartford v. Hartford L. & A. Ins. Co., 45 Conn. 22; Bishop v. Globe Co., 135 Mass. 132; Bohmer v. Bank, 77 Va. 445.

The law under which this corporation was organized was a general law. So it has been decided by the supreme court of Michigan (*Newberry v. Manufacturing Co.*, 17 Mich. 141, 151), where it is said: "The law in question is a public act, and all are charged with knowledge of its provisions." This construction by the supreme court of the state which enacted the law is conclusive in this court, as well as every-where, as to its character. The law in terms provides for a lien, and that being a public law all are charged with knowledge of its provisions. Generally, wherever paper of a nature similar to this is issued, under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to it by such statute. And this is true whether the party lives in or out of the state by which the law was enacted. See authorities cited, *supra*. It was unnecessary to enter upon the certificate any statement of the limitations and burdens which the law casts upon all such paper, and the omission to state such limitations upon the face of the paper is not a waiver by the corporation of the benefits thereof. In the case in 2 Wheaton, *supra*, where the act of incorporation gave a lien, this court, by Mr. Justice Story, said: "The certificate, issued to Patton for the fifty shares held by him (which is in the usual form), declares the shares to be 'transferable at the said bank, by the said Patton, or his attorney, on surrendering this certificate.' No person, therefore, can acquire a legal title to any shares, except under a regular transfer, according the rules of the bank; and if any person takes an equitable assignment it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice."

Repeated efforts have been made to have certificates of stock declared negotiable paper, but they have been unsuccessful. Such a certificate is not negotiable in either form or character, and, like every non-negotiable paper, whoever takes it does so subject to its equities and burdens; and, though ignorant of such equities

and burdens, his ignorance does not relieve the paper therefrom, or enable him to hold it discharged therefrom. It is objected that upon the face of this certificate it is nowhere stated that "George H. Hammond & Company" is a corporation. While this is not expressly stated, it clearly appears; and, even if it were not so, the certificate is non-negotiable paper, and the party had no right to deal with it as though it were otherwise. He takes it subject to the burdens that in fact rested upon it. Technical matters are suggested by counsel, but we deem it unnecessary to notice them. The circuit judge unquestionably, as appears from the record, ruled upon the substantial question considered by us. We think his ruling erroneous, and the case must, therefore, be reversed. That this lien of a corporation may be waived cannot be doubted. *Bank v. Bank*, 105 U. S. 217, 221. Perhaps when all the facts are developed, as they can be on the new trial, matters may be disclosed sufficient to establish a waiver; but mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it. It constitutes no waiver on the part of the corporation.

Judgment reversed, and the case remanded for a new trial.

1. *Lien of corporation upon its stock for debts of shareholder.* — Where the charter or statutes create a lien upon shares of stock in favor of the corporation for the debts of the holder of the stock to the corporation, all persons dealing with the corporation or its stock are bound to take notice of it. *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *First National Bank v. Hartford, etc., Ins. Co.*, 45 Conn. 22; *Reese v. Bank*, 14 Md. 271; *Bishop v. Globe Co.*, 185 Mass. 132; *St. Louis Perpetual Life Ins. Co. v. Goodfellow*, 9 Mo. 149; *Bank of Utica v. Smalley*, 2 Cow. 770; *McCready v. Rumsey*, 6 Duer, 594; *Rogers v. Bank*, 12 S. & R. 77; *Grant v. Mechanics' Bank*, 15 S. & R. 140; *Sewall v. Bank*, 17 S. & R. 285; *Downer's Admr. v. Zanesville Bank, Wright (Ohio)*, 477; *Presbyterian Cong. v. Bank*, 5 Penn. St. 345; *Bohmer v. Bank*, 77 Va. 445; *Union Bank v. Laird*, 2 Wheat. 390; *Banking Association v. Wiltz*, 10 Fed. Rep'r, 390.

2. *Negotiability of stock certificates.* — All the authorities hold that certificates of stock are not negotiable. *Sherwood v. Meadow Valley Mining Co.*, 50 Cal. 412; *Barstow v. Savage, etc., Co.*, 64 Cal. 391; *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 231; *Weyer v. Second National Bank*, 57 Ind. 198; *Sewall v. Boston Water Power Co.*, 4 Allen, 277; *Shaw v. Spencer*, 100 Mass. 333; *Mechanics' Bank v. New York, etc., R. Co.*, 18 N. Y. 599; *Anderson v. Nicholas*, 28 N. Y. 600; *Leitch v. Wells*, 48 N. Y. 585; *Weaver v. Barden*, 49 N. Y. 236; *Moore v. Metropolitan National Bank*, 55 N. Y. 41; *Mandlebaum v. North Am. Mining Co.*, 4 Mich. 465; *Bank v. Lanier*, 11 Wall. 369. See, also, *Libbey v. Tobey*, ante, p. 281, and note, pp. 293-295.

GAUS ET AL. V. SWITZER ET AL.

(24 Pac. R. 18; 9 Mont. 408.)

1. CORPORATIONS. LIABILITY OF TRUSTEES FOR FAILURE TO MAKE REPORT. The statutes of Montana required every corporation annually to make and publish, or file for record, a certain report, and in default thereof provided that all the trustees of the company should be jointly and severally liable for all the debts of the company then existing or thereafter contracted before such report was filed. Held, that the trustees were liable under the statute for a failure to make the report required, though the corporation had become insolvent, had ceased to do business, and had transferred all its property in payment of its debts before the time for making the report.

Fletcher Maddox and Casey & Smith for appellants. *F. N. & S. H. McIntyre* for respondents.

BLAKE, C. J. This appeal has been taken from the judgment of the court below, which was entered upon the pleadings. The complaint alleges, in substance, that the Helena Pressed Brick Company was a corporation, which had been organized under the laws of the territory of Montana, and had its principal place of business in Helena, and was doing business in the counties of Lewis and Clarke and Jefferson; that Switzer et al., the defendants, were at all times the trustees of the corporation, and discharged the duties of the office; that the corporation was indebted June 12 and 21, 1889, at said Helena, to various persons, in certain sums, which are enumerated, and the plaintiffs by purchase acquired these claims; that said accounts have not been paid, "and the plaintiffs further say that the said corporation, the Helena Pressed Brick Company, did not, within twenty days from the 1st day of September, 1889, make, and have not, at any time since said date, made, a report stating the amount of its capital stock and of the proportion of the same actually paid in, and the amount of the existing debts of the said company at the period last aforesaid, or at any time subsequent thereto; nor did said company cause any such report to be signed by its president, nor verified by the oath of its secretary, nor to be filed in the offices of the recorder of Lewis and Clarke and Jefferson counties, nor to be published in any newspaper printed and published in either of said counties; and the said defendants, and also said company, wholly neglected

and refused, during said period of twenty days from September 1, 1889, and have ever since neglected and refused, to cause such report to be made, signed and verified, filed, printed and published in conformity with the provisions of section 460, p. 728, division 5 of the Compiled Statutes of Montana territory, and they, the said company, and the said defendants, as such trustees, have at all times neglected and refused, and still do neglect and refuse, to comply with the provisions of the said statute." The answer denies "that, at the times mentioned in plaintiff's complaint, the Helena Pressed Brick Company was a corporation existing or doing business under or by virtue of the laws of Montana territory, having its principal place of business in the city of Helena, Lewis and Clarke county, Montana territory, or any other place, or that it had any place of business at all, or that it was doing business in Lewis and Clarke county and Jefferson county, or any other place." The answer alleges "that on or about July 13, 1888, the said the Helena Pressed Brick Company was duly incorporated under the laws of Montana territory, and commenced doing business in the counties of Lewis and Clarke and Jefferson, in said territory; (2) that on or about December 14, 1888, the said corporation was solvent, and that thereafter said corporation was at no time solvent; (3) that in the month of April, Jacob Switzer, Albert Kleinschmidt, Fletcher Maddox, Frank L. Sizer and G. V. Hallett, were trustees of said corporation; (4) that at said time, namely, in the month of April, 1889, the said the Helena Pressed Brick Company were involved in large pecuniary losses and liabilities, and were unable to pay its debts; * * * that the enterprise of manufacturing brick at their yards had proved an entire and hopeless failure, and the company was at such time hopelessly insolvent; that at said time, July 15, 1889, said company executed a note and mortgage to Jacob Switzer for \$11,192.05, due by it to him. * * * Its means at said date of carrying on business were exhausted, and it had turned over to said Jacob Switzer all its property and machinery, so that he might, by some possible means, work out from its property and the conducting of the same some portion of the amount due him. At this time the corporation was entirely abandoned, and all profits or losses of the company in its business was at the profit or loss of said Jacob Switzer, and no one else. That thereafter no officers or trustees

of said company exercised any corporate act or function in the business of said corporation, and thereafter manifested no intention to resume business thereof, but abandoned same entirely, and said Switzer purchased all property of said company thereafter, and the same belongs to him irrevocably." The complaint was filed September 24, 1889, and prayed for judgment for said sums against the said trustees, the appellants herein. No replication was made to the answer.

The section of the statute which is referred to in the complaint is as follows: "§ 460. Every such company shall, annually, within twenty days from the 1st day of September, make report, which shall be published in some newspaper published in the town, city or village, or, if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if, within the time herein mentioned, said trustee, or board of trustees, or company shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation." Comp. St., div. 5. The complaint states facts which are sufficient to establish the obligation, under the statute of the trustees of the Helena Pressed Brick Company to pay its indebtedness. Does the answer plead a defense which shields the appellants from this liability? The question is presented to this court for the first time, and the vast number and manifold character of the corporations within the state, and the conflict in the decisions upon some of the propositions which are

relevant to the inquiry, demand a careful review of the authorities. It is the general rule that this law is penal, and must be construed strictly. *Steam-Engine Co. v. Hubbard*, 101 U. S. 191; *Chase v. Curtis*, 113 U. S. 457; 5 Sup. Ct. Rep'r, 554. Mr. Morawetz, in his valuable treatise on Private Corporations, considers the subject, and makes the following appropriate comments: "It is not always quite clear what the courts mean to express by saying that statutes of this character are 'penal,' and that they impose upon the directors a 'penal liability.' * * * Nor is the liability of the directors under these statutes penal in the sense in which the word 'penal' is used in criminal law; it is not a penalty or fine imposed by the state for the infraction of a public law. * * * The statutes imposing this liability establish a new rule of private right, a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called 'penal' appears to be that it does not exist at common law, and is neither created by contract, nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company." Vol. 2 (2d ed.), § 908. Even with this understanding, "in construing penal statutes, we must not, by refining, defeat the obvious intention of the legislature." *Potter's Dwar. St.* 247. The law before us is clothed in clear and concise terms, and we think that the same end will be attained by the application of any canon of interpretation. There should be no difficulty in carrying out "the true intent and meaning of the legislative assembly." Under certain conditions the statute, in effect, declares that the trustees of the Helena Pressed Brick Company "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." There are no exceptions in this clause, and there does not appear to be any obscurity in the scope of the liability of the trustees if the words shall be understood and construed according to the approved and common usage of the language. *Comp. St., div. 5, § 202*. There has been no change in the board of the trustees of the Helena Pressed Brick Company since its organization. The appellants were its officers when the debts mentioned in the pleadings were contracted, and did not publish or file the annual report in 1889, or comply in any man-

ner with the requirements of the statute, *supra*. It was adjudged in *Steam-Engine Co. v. Hubbard*, *supra*, that the liability of the president of a corporation does not exist as to debts which were contracted before the period when he neglected or refused to make the certificate authorized by law, and remained unpaid. This deduction followed the phraseology of the statute of the state of Connecticut, which was decisive of the case, and provides that this officer shall be liable by reason of his default "for all debts of such corporation contracted during the period of such neglect or refusal." In this respect, the laws of the state of New York are like the section, *supra*, and Mr. Justice Clifford, in the opinion in *Steam-Engine Co. v. Hubbard*, *supra*, says: "Marked differences exist between the provisions of the New York statute and those of the state of Connecticut, the latter being much less stringent than the former. By the New York law the duty of making the annual return is required of the corporation itself and the penalty for neglect is imposed upon the trustees who are intrusted with the management of its affairs. Consequently, it is a corporate duty, and, being such, each succeeding board is bound to perform it if it has been neglected by their predecessors. Unlike that, the duty to deposit the certificate, under the Connecticut statute, is devolved on the president and secretary in terms which show that a new president does not inherit the consequences of neglect of duty or pecuniary liability from his predecessor in office. He is made liable for his own neglect, and not for that of a prior officer, as clearly appears from the closing sentence of the penal section. In New York, the trustees upon default, are made liable for all the outstanding debts of the corporation, whenever contracted; but in Connecticut the president and secretary are liable only for debts contracted during the period of such neglect or refusal." In *Miller v. White*, 50 N. Y. 139, the statute was construed by Mr. Justice Peckham, who said: "It is absolute that the trustees shall be liable for all the debts of the company, if the report be not made, no matter by whose default. If one of the trustees did all in his power to have it made, yet if the president, or a sufficient number of his co-trustees to constitute a majority, declined to sign it, or if the president and secretary declined to verify it by oath, the faithful trustee seems to be absolutely liable, as well as those who refuse to do their duty." See,

also, *Arme Co. v. Barlow*, 63 N. Y. 62; *Knox v. Baldwin*, 80 N. Y. 610.

Some expressions may be found in the cases which discuss the effect of the resignation of a trustee upon his official acts, that appear to qualify this interpretation of the statute which defines the liability for the payment of the indebtedness of the corporation. But, as we have seen, the trustees of the Helena Pressed Brick Company did not resign, and no questions of this nature arise upon this hearing. We readily accept the legal principles which have been laid down, and hold that they reiterate the plain intent of the law regarding the responsibility of the officers of this corporation.

The main ground of the defense, which is set forth in the answer, has been the salient point of dissension. It is insisted that the Helena Pressed Brick Company, in September, 1889, had practically abandoned its functions; that its operations in manufacturing brick had resulted in financial disasters; that the business had been abandoned; that its means had been exhausted, and all the property had been delivered to Switzer in satisfaction of debts which could not be paid, and that the same belonged to him irrevocably; that since July, 1889, no officer of the corporation had discharged any duty; and that, under these circumstances, the trustees were not obliged to file or publish the annual report in 1889. The authorities of the state of New York have repeatedly asserted the soundness of this position. The leading case of *Bruce v. Platt*, 80 N. Y. 379, reviews the cases which have been decided in her courts, and demonstrates that this doctrine, which was maintained in 1822, in *Slee v. Bloom*, 19 Johns. 456, has been consistently upheld therein. The reasons which underlie these decisions are succinctly given in *Kirkland v. Kille*, 99 N. Y. 395; 2 N. E. Rep'r, 36, by Mr. Justice Danforth, who approves *Bruce v. Platt*, supra, and says: "When the condition of the company is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in that section. In other words, when these events happen it ceases to be a company 'carrying on business,' and the direction of the statute has no application." The liability of the appellants is a consequence of the failure or

omission to discharge a trust enjoined by law. Their authority, and the formation and perpetuation of the Helena Pressed Brick Company, depend upon the statute of the state. The legislation relating to corporations contemplates that these bodies shall use and enjoy their privileges until their existence is legally terminated. They can be disincorporated by the order of the district court, upon the hearing of a petition which has been duly presented. Comp. St., div. 5, § 488. They can be dissolved by the limitation of their term in the articles of incorporation. Their franchises can be forfeited for various causes through judicial proceedings. Code Civil Proc., tit. 8, chap. 5; *Territory v. Road Co.*, 2 Mont. 96. In the eyes of the statute, however, the rights of the trustees continue after these events, and they are expressly empowered "at the time of dissolution" to be the active officers of the corporation for many purposes, which are defined. Comp. St., div. 5, § 489. The acts which are specified in the answer did not dissolve the Helena Pressed Brick Company, or extinguish its charter, or remove from office the trustees. Chancellor Kent writes: "But the old and well-established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved by reason of any misuser or non-user of its franchises, until the default has been judicially ascertained and declared." 2 Kent Com. 312. In *De Camp v. Alward*, 52 Ind. 473, Mr. Chief Justice Downey says, in the opinion: "We do not regard the act of the corporation in assigning its property to a trustee for the payment of the debts of the corporation, etc., as a surrender of its franchises as a corporation, and as working a dissolution of the corporation. A corporation may cease to do business, sell or assign its property for the payment of its debts, etc., and yet not cease to be a corporation." In *Rollins v. Clay*, 33 Me. 137, the court observes that "a corporation is not dissolved by ceasing to exercise its powers; nor because its stockholders and directors may consider it to be 'defunct.'" In *Reichwald v. Hotel Co.*, 106 Ill. 451, Mr. Justice Sheldon says, in the opinion: "The effect of this transfer of all the hotel property no doubt was to terminate the business of the corporation; but that was not the necessary effect. It is entirely clear, upon the authorities, that the disposal of all the property of a corporation has not the effect to end or dissolve the corporation." See, also,

Glass Manufactory v. Langdon, 24 Pick. 49; Buell v. Buckingham, 16 Iowa, 296; Moseby v. Burrow, 52 Tex. 403; Hotel Co. v. Sauer, 65 Mo. 288; Zinc Co. v. Franklinite Co., 13 N. J. Eq. 335; Sullivan v. Mining Co., 39 Cal. 468. Mr. Chief Justice Shaw held, in Coburn v. Manufacturing Co., 10 Gray, 243, that a corporation was not extinguished by proceedings in insolvency, and concluded with the remark that, "if the legislature had so intended, they would have so declared." This rule is applicable to the statute under investigation. It has been shown that the Helena Pressed Brick Company is a valid corporation, and in the full enjoyment of all the powers it originally possessed, notwithstanding the facts which are contained in the answer. So long as this condition is not disturbed, the trustees are entitled to control its affairs, and the appellants cannot escape the responsibility which the legislature has created for their defaults. The phrase, "where the business of the company is carried on," which forms the corner stone of the decisions of the courts of the state of New York, *supra*, is found in several sections of the chapter concerning corporations. The certificate of incorporation shall state "the county in which the operations of said company shall be carried on." § 446. "Any certificate * * * may designate one or more places where the company may carry on their business in the territory of Montana." § 448. Another certificate shall be recorded in the county "wherein the business of said company is carried on." § 459. Provision is made for the removal of the principal place of business into some other county. § 490. In *Ex parte Schollenberger*, 96 U. S. 377, Mr. Chief Justice Waite says: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter." The last sentence of the section under consideration specifies "the county in which the business of the said company is carried on, as declared in its certificate of incorporation." This construction, which has been given by the legislature, applies to these expressions, which refer to the "legal home" of the corporation. When corporations are dissolved in any of the modes which have been pointed out, the evidence will consist of records which are open to public inspection, and no creditor or shareholder can be injured through ignorance of their financial standing. But if

testimony is essential to prove abandonment, or any fact that is a matter of intention in the mind of the trustees, or any other persons, the difficulties in the path of the holders of accounts against corporations in default are increased. Proof of the neglect of the trustees to publish or file the annual reports in September can be easily overcome by the statements of the culpable parties that they had abandoned the enterprise in August of the same year. Uncertainty of this degree can be prevented by a rigid adherence to these views. The benefits of the statute regulating corporations are inseparable from the penalties which are prescribed, and all officers who undertake the performance of its obligations will be compelled to render obedience.

The judgment is affirmed, with costs.

Harwood and De Witt, JJ., concur.

STATUTORY LIABILITY OF THE OFFICERS OF CORPORATIONS FOR
A FAILURE TO MAKE REPORT.

1. *The statutes.*—Statutes more or less similar to that adjudicated upon in the foregoing case exist in many of the states. There do not appear to be many reported cases arising upon such statutes outside of New York. In the latter state the decisions are numerous. Some of the states have statutes identical with that of New York. The statutes of other states are modeled after that of New York and all are more or less similar to it. For the better understanding of the decisions the New York statute with its amendments, is here given. The statute appears as section 12 of an act of 1848, entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and is as follows:

"§ 12. Every such company shall annually, within twenty days from the 1st day of January, make a report which shall be published in some newspaper, published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees; and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company, then existing, and for all that shall be contracted before such report shall be made."

This section was amended by chapter 657, Laws 1871, section 8, by adding thereto the following: "But whenever under this section a judgment shall be recovered against a trustee severally, all the trustees of the company shall contribute a ratable share of the amount paid by such trustee on such judg-

ment, and such trustee shall have a right of action against his co-trustees, jointly or severally, to recover from them their proportion of the amount so paid on said judgment."

By chapter 510, Laws of 1875, said section 12 was amended so as to read as follows:

"§ 12. Every such company shall within twenty days from the 1st day of January, if a year from the time of filing the certificate of incorporation shall then have expired, and, if so long a time shall not have expired, then within twenty days from the 1st day of January in each year after the expiration of a year from the time of filing such certificate, make a report," etc. From this point the statute as re-enacted is the same as the original section with the amendment of 1871.

This statute had a saving clause as to actions pending. Claims under the former statute for which actions were not pending were lost by the repeal. *Knox v. Baldwin*, 80 N. Y. 610; *Victory Webb Printing Co. v. Beecher*, 97 N. Y. 651, affirming 26 Hun, 48; *Carr v. Resher*, 50 Hun, 147.

In 1853 the act of 1848 was amended by an act, section 2 of which is as follows:

"The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any other further calls, neither shall the holders thereof be liable for any other further payments under the provisions of the tenth section of the said act; but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the act." See *Whitaker v. Masterson et al.*, 106 N. Y. 277, 281.

A statute of California, Laws of 1880, page 134, required the directors of mining companies on the first Monday of each month, to make a statement of receipts and expenses for the previous month, and showing liabilities and cash on hand, which should be verified by the president and secretary and posted in a conspicuous place in the office of the company, and for a failure to comply with the statute, the directors were made liable to any stockholder in the penalty of \$1,000 liquidated damages. *Hewlett v. Epstein*, 63 Cal. 184; *Loveland v. Garner*, 71 Cal. 541; *Schenck v. Bandmann*, 81 Cal. 281.

For a similar statute in Indiana, see *State v. Cox*, 88 Ind. 254; *State v. Hanna*, 84 Ind. 183.

For the statutes of other states reference is made to the cases hereafter cited.

2, What debts are within the statute — debts "existing" — debts "contracted." — The New York statute makes the trustees liable for all debts of the corporation "existing" at the time of the default and for all that may be "contracted" during the continuance of the default. The language of the decisions is not always clear as to what constitutes an *existing debt* within the meaning of the statute. But it would seem to be the holding that an actual subsisting obligation for the payment of money was an existing debt, though not due and payable at the time of the default. *Rector, etc., of Trinity Church*

v. Vanderbilt, 98 N. Y. 170; *Whitney Arms Co. v. Barlow*, 68 N. Y. 84; *Same v. Same*, 63 N. Y. 62; *Jones v. Barlow*, 63 N. Y. 202; *Chambers v. Lewis*, 28 N. Y. 454; *Garrison v. Howe*, 17 N. Y. 458; *Carr v. Risher*, 50 Hun, 147; *Victory Webb Printing Co. v. Beecher*, 26 Hun, 48; affirmed, 97 N. Y. 657; *Vernon v. Palmer*, 48 N. Y. Supr. Ct. 281; *Haight v. Naylor*, 5 Daly, 219; contra, *Nimmons v. Hennion*, 2 Sweeney, 668. A debt is "contracted" within the sense of the statute when the obligation to pay becomes complete, though the day of payment may be in the future. *Ibid.*; and *Vernon v. Palmer*, 48 N. Y. Supr. Ct. 281, reversing S. C., 62 How. Pr. 425; *Oviatt v. Hughes*, 41 Barb. 541; *Bond v. Clark*, 6 Allen, 361; and, see, *First Natl. Bank v. Fenton*, 23 Hun, 309.

In *Vernon v. Palmer*, 48 N. Y. Supr. Ct., 285, the court say:

"The true doctrine is that a debt is contracted when, in consideration for value received by the corporation, a payment is to be made, no matter whether at once or at a future period. The mere execution of a contract between the seller and the corporation, to the effect that the former shall deliver, and that the latter should receive and pay for, personal property at a future day, does not of itself amount to the contraction of a debt within the meaning of the statute, but upon the delivery of the property according to the contract, the debt springs into existence. This must be so upon principle, and it is in accord with all the reported cases, and especially with the reasoning in *Garrison v. Howe*, 17 N. Y. 458; *Whitney Arms Co. v. Barlow*, 68 N. Y. 62; S. C., 68 N. Y. 84.

"That being so the fact that credit was given is unimportant, as long as the period for which it was given has expired at the time of the commencement of the action. While the credit runs, the liability on the part of the trustees who created the debt during the existence of a default, is dormant, but upon maturity of the debt and the failure of the company to meet it, the dormant liability ripens into a cause of action."

Where goods are sold and delivered to a corporation upon four months' credit, the debt is contracted when the goods are delivered, but the action does not accrue against the trustee, until the expiration of the credit. *Vernon v. Palmer*, 48 N. Y. Supr. Ct. 281, reversing S. C., 62 How. Pr. 425; *Garrison v. Howe*, 17 N. Y. 458. Where a corporation passed a resolution to employ a person at a salary of \$1,000 a year, it was held that the salary was not payable until the end of the year, and no debt was contracted when the resolution was passed. *Oviatt v. Hughes*, 41 Barb. 541. In *Bond v. Clark*, 6 Allen, 361, the corporation in question had ordered certain time-piece movements of the plaintiff, which arrived from Geneva on September 30, 1859. The corporation was notified, but the movements were variant from the order in one particular, and it was agreed that the plaintiff should alter them at his own expense to correspond with the order. He made the alteration upon one, which was delivered and accepted. Thereafter he altered the others and had them ready for delivery on October 24. On that day he charged them all to the company on his books, but it would appear that they were not delivered until after the month of October. The corporation had the whole of the month of October in which to make a certain report required by the statute. It did not make this report, and from and after November 1 it was in default. The court held that the

debt was contracted when the charge was made on the books and not when the movements were delivered, and consequently that there was no default when the debt was contracted, and the officers were not liable. The plaintiff had recovered a judgment against the corporation with interest from October 24, but the opinion does not go upon this as an estoppel.

It has been held that a claim arising upon a tort is not a debt within the statute even though reduced to judgment. *Esmond v. Bullard*, 16 Hun, 65; *Heacock v. Sherman*, 14 Wend. 58; *Doolittle v. Marsh*, 11 Neb. 248; *Chase v. Curtis*, 118 U. S. 452. In the latter case, which arose in New York, the plaintiff recovered judgment against the corporation in question in an action of tort on July 30, 1874. The corporation neglected to file any report within the twenty days from January 1, 1875, and the defendants were trustees at the time of the default. The court held, following the New York decisions, that the judgment against the company was no evidence whatever of a debt as against the trustees, and that the plaintiff must recover upon his original claim. The court also held upon principle and upon the authority of *Heacock v. Sherman*, 14 Wend. 58, and *Louisiana v. New Orleans*, 109 U. S. 285, that a claim founded upon a tort was not within the statute. "The statute involved in this discussion," says the court, "is not a remedial statute, to be broadly and liberally construed, but is a penal statute with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability. Under such a rule of construction its language is limited by its own terms, to a liability, on the part of the trustees, to debts of the corporation existing and arising *ex contractu*."

But the court of appeals in a recent case has held that a judgment for costs against the corporation in an action of tort brought by the corporation against the plaintiff's assignor was a debt within the statute. The judgment in question was rendered in September, 1885. No report was filed either in 1885 or 1886. The court held that the judgment was an *existing* debt which the corporation was bound to report in January, 1886, and consequently was a debt *existing* at the time of the default in that month for which the trustees were liable. The court says:

"This judgment was clearly one of the debts which the company was bound to include among its 'existing debts' in the report which it was required to make, file and publish within twenty days after the 1st day of January, 1886. The section requires the report to state the amount of all its existing debts of every nature, and it is the clear meaning of the section that if such report be not made the trustees shall be personally liable for all debts which the company was thus bound to report. It may be inferred that it was the purpose of the law-makers to require this report to be made, published and filed for the information, benefit and protection of existing creditors of the company not only, but of all persons who might thereafter enter into contract relations with it. It may also have been the purpose of the law-makers to require the report from every manufacturing corporation as a check upon extravagance and mismanagement of its affairs by its trustees, by constantly keeping before them the reminder that at least once a year the affairs of the company are to be exposed to the public view. It may also be supposed

that these reports were required, so that information might be readily obtained by assessors for the purpose of taxation, and by other public officials who might have occasion to supervise the conduct of the corporation, or to proceed against it for any purpose whatever; and, therefore, to make sure of the accomplishment of these important purposes, the trustees are made personally liable for all the debts of the company in case of the failure of the company, within the time specified, to make the report." Page 273. * * *

"This judgment for costs was in every sense a debt of the company which it was under precisely the same obligation to pay as any other debt. It is true it was not a debt existing antecedently to the judgment, but it was a debt created by the judgment itself, and as it was a debt against the corporation, which it was bound to pay, it could be enforced against the defendant. * * *

"It may be that judgment is not conclusive as against the defendant, and it is undoubtedly open to him to show that the recovery was either collusive or fraudulent. But it is a debt created by the judgment itself. It is proved by the production of the judgment, and that is at least *prima facie* evidence of its existence. It is unlike the case of *Miller v. White*, 50 N. Y. 137, where the judgment was upon a debt antecedently existing, in which case it was held that the judgment was neither conclusive nor *prima facie* evidence of the debt, and that it was the duty of the plaintiff to prove and establish his debt independently of the judgment. The reason upon which that decision is based can have no application to a case like this where there was no liability on the part of the company to pay the costs antecedently to or independently of the judgment. We have carefully examined all the authorities to which our attention is called, and we find none of them in conflict with the views here expressed.

"We have not overlooked the clause which follows the words 'debts of the company then existing,' to wit: 'And for all that shall be contracted before such report shall be made.' The claim on the part of the defendant that these words limit the meaning of the former words to such debts of a corporation as are voluntarily contracted, we do not deem to be well founded. The word 'contracted' here means the same as 'incurred' and includes every debt for which the corporation becomes bound. There is no apparent reason for any discrimination as to the kind of debts, and we do not think any was intended." *Allen v. Clark*, 108 N. Y. 269, 274-5.

Cable v. McCune, 26 Mo. 371, arose under a statute very similar to that of New York, except that it made the stockholders liable instead of the trustees merely. The plaintiff's claim against the corporation in question arose as follows. The plaintiff owned a steamboat known as the *James Hewitt*. The corporation, the St. Louis Marine Railway and Dock Company, owned a marine railway, dock, machinery, etc., and was engaged in the business of raising and repairing boats. The corporation contracted with the plaintiff to raise and repair the *James Hewitt*. In attempting to do so the boat was stove in and precipitated over the side of the dock into deep water, sunk and lost. The plaintiff claimed that the loss was due to the negligence, unskillfulness and defective appliances of the corporation. It was held that the claim was not a debt within the meaning of the statute.

It is immaterial where the debt was contracted or where the creditor resides.

The action can be maintained upon a debt contracted in a foreign state. *Sears v. Waters*, 44 Hun, 101.

3. **What excuses report—ceasing business—insolvency, etc.**—It is settled law in New York that where the company has ceased to do business and has disposed of its property, or where it is insolvent and its assets are in the hands of an assignee or receiver, that it is excused from making any further reports. *Huguenot National Bank v. Studwell*, 74 N. Y. 621; *Loose v. Bullard*, 79 N. Y. 404; *Bonnell v. Griswold*, 80 N. Y. 128; *Bruce v. Platt*, 80 N. Y. 879; *Van Amburgh v. Baker*, 81 N. Y. 46; *Kirkland v. Kille*, 99 N. Y. 390; *First National Bank v. Lamon*, 55 Hun, 414; *Cochran v. Smith*, 54 N. Y. Supr. Ct. 117; *Slee v. Bloom*, 19 Johns. 456; S. C., 20 Johns. 669. But the mere cessation of business will not excuse the making of a report if the company retains the means of doing business. *Bradt v. Benedict*, 17 N. Y. 93; and see *Sanborn v. Lefferts*, 58 N. Y. 179; *Jones v. Barlow*, 62 N. Y. 202.

4. **What persons liable—irregular election—resignation—holding over, etc.**—Those who have been elected or appointed to the office of trustee and have accepted and acted are liable under the statute, though their election or appointment may be irregular and confer no legal title to the office. *Thayer v. New England Lith. Steam Print. Co.*, 108 Mass. 523; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Halstead v. Dodge*, 51 N. Y. Supr. Ct. 169; *Van Amburgh v. Baker*, 81 N. Y. 46; *Easterly v. Barber*, 65 N. Y. 252. In *Craw v. Easterly*, 54 N. Y. 679, the defendant was chosen trustee of a corporation in May, 1868, by proceedings which were void. He, however, accepted the position and acted as trustee until December, 1868, when he removed to another state where he resided until October, 1869. The term for which the defendant was chosen did not expire until March, 1869. He performed no act as trustee after his removal from the state. It was held that he was not liable in consequence of the failure of the corporation to file a report in January, 1869; that while the defendant might bind himself and the corporation while he continued to act as trustee, yet he was not bound to act, and having ceased to do so before the default occurred, he was not liable. S. C., 4 Lans. 518.

The defendant must have accepted the office of trustee to be liable. It is not enough that he has been elected. *Cameron v. Seaman*, 69 N. Y. 396.

Those who come into office during the continuance of a default are not liable for debts contracted before they became trustees. *Boughton v. Otis*, 21 N. Y. 261, affirming 29 Barb. 196; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Austin v. Berlin*, 13 Col. 198; *State v. Cox*, 88 Ind. 254; *State v. Hanna*, 84 Ind. 183.

Nor are trustees liable for debts contracted after they go out of office, though during the continuance of a default which began while they were in office. *Boughton v. Otis*, 21 N. Y. 261; *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297; *Bruce v. Platt*, 80 N. Y. 879; *Van Amburgh v. Baker*, 81 N. Y. 46; *Steam Engine Co. v. Hubbard*, 101 U. S. 188.

One who holds over and acts as trustee is liable in the same manner as during the regular term. *Denning v. Poleston*, 55 N. Y. 635; S. C., 85 N. Y. Supr. Ct. 309; *Reed v. Keese*, 60 N. Y. 616; *Van Amburgh v. Baker*, 81 N. Y. 46; *Jones v. Barlow*, 88 N. Y. Supr. Ct. 142. But one is not bound to

hold over, and, if he ceases to act, his office becomes vacant at the end of the term. *Van Amburgh v. Baker*, 81 N. Y. 46.

Under the New York statute the secretary of the corporation is not liable. *Bolen v. Crosby*, 49 N. Y. 188.

5. **Effect of judgment against the company.**—In New York it has been repeatedly held that in a suit under the statute in question a judgment against the corporation is not even *prima facie* evidence against the trustee, but that the suit against the latter must be founded upon the original claim against the company. *Miller v. White*, 50 N. Y. 137; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 73; *Rorke v. Thomas*, 56 N. Y. 559, 565; *Hastings v. Drew*, 76 N. Y. 9, 15; *Bruce v. Platt*, 80 N. Y. 379, 381; *Knox v. Baldwin*, 80 N. Y. 610, 613; *Esmond v. Bullard*, 16 Hun, 65; *Kraft v. Coykendall*, 34 Hun, 285. The Supreme Court of the United States has so held under the same statute, following the New York decisions. *Chase v. Curtis*, 113 U. S. 452. So in *Cooke v. Pearce*, 23 S. C. 239, under a similar statute. The New York decisions are modified to some extent by the recent case of *Allen v. Clarke*, 108 N. Y. 269; S. C., 48 Hun, 377; which holds that where the debt is *created* by the judgment, the judgment is *prima facie* evidence against the trustee, though it is intimated that it would be open to him to show that it was collusive or fraudulent.

In Massachusetts a judgment against the corporation is held to be conclusive against an officer in a suit against him under a similar statute. *Thayer v. New England Lith. Steam Print. Co.*, 108 Mass. 523.

6. **When action accrues — successive defaults — limitations.**—The action accrues against the trustee upon a debt for which he is liable immediately upon the default, if the debt is due and, if not, then upon the maturity of the debt. There must be a present right of action against the corporation before an action accrues against the trustee. *Rector of Trinity Church v. Vanderbilt*, 98 N. Y. 170. The statute being penal the action is barred in the time limited for the recovery of a penalty, which in New York is three years. *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Knox v. Baldwin*, 80 N. Y. 610; *Duckworth v. Roach*, 81 N. Y. 49; *Rector, etc., of Trinity Church v. Vanderbilt*, 98 N. Y. 170. After the statute has once commenced to run, subsequent defaults do not affect it, but the time is computed from the first default and the accruing of the action thereunder. *Rector, etc., of Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Losee v. Bullard*, 79 N. Y. 404; *contra*, *Nimmons v. Toppan*, 2 Sweeney, 652.

7. **Sufficiency of report as to form and substance — false report.**—The report should in all respects meet the requirements of the statute. *Vincent v. Sands*, 11 Abb. Pr. (N. S.) 370. If a report is sufficient on its face it will be a compliance with the statute though its statements are false. A false report cannot be treated as no report. *Bonnell v. Griswold*, 80 N. Y. 128; *Pier v. Hanmore*, 86 N. Y. 95.

The New York statute requires the report to be signed by the president and a majority of the trustees, and if not so signed the trustees will be liable. *Westerfield v. Rudde*, 12 Daly, 450. Where there were five trustees a report signed by the president and two other trustees was held sufficient. *Glens Falls Paper Co. v. White*, 18 Hun, 214. Where twelve trustees were pro-

vided for, but three vacancies existed, a report signed by six trustees was held good. *Wallace v. Wash*, 52 Hun, 328. An allegation in a complaint that the defendants, being trustees, failed to make a report, which does not show that they constituted a majority of the board was held insufficient. *Niles v. Dodge*, 70 Ind. 147.

A verification by the president that the report is true to the best of his knowledge and belief is a compliance with the statute. *Glens Falls Paper Co. v. White*, 18 Hun, 214. In another case the following verification was held sufficient; "Sworn to before me this 13th day of January, 1870. Charles W. Anderson, notary public, N. Y. county." *Bonnell v. Griswold*, 80 N. Y. 128.

The debts may be stated as not exceeding a certain sum. *Glens Falls Paper Co. v. White*, 18 Hun, 214.

The following reports as to the capital and its payment were held to be a sufficient compliance with the statute: "The amount of the capital stock of this company, and which has been issued for the purchase of patent rights and which has not been paid in cash, is \$300,000." *Whitney Arms Co. v. Barlow*, 68 N. Y. 62. "The capital stock of said company is two millions of dollars, that said capital stock has been paid up in full." *Bonnell v. Griswold*, 80 N. Y. 128. "Amount of the capital of the company, \$50,000; amount of the capital paid in, \$50,000, all of which has been paid in in cash, patent rights, merchandise, machinery, accounts, etc., necessary to the business, and for which stock, to the amount of the value thereof, has been issued by the company." *Whitaker v. Masterton*, 106 N. Y. 277. In the last case it is held that no penalty attaches for a violation of the act of 1853, which requires that when the stock is paid for in property it shall be stated according to the fact. The statute being highly penal a report made in good faith as a compliance with the statute, if ambiguous, should be construed in favor of the trustees. *Whitney Arms Co. v. Barlow*, 68 N. Y. 62.

In *Glens Falls Paper Co. v. White*, 18 Hun, 214, the report was as follows: "Amount of capital stock, of which all but five shares were issued for the purchase of property necessary for the business of the association, and such five shares have been paid in full, \$150,000." This was held bad because it did not state the par value of the shares, so that it could be determined how much was paid in property and how much in cash. But this decision is overruled by *Whitaker v. Masterton*, 106 N. Y. 277, which holds that the report need not show the proportion paid in cash and the proportion in property.

8. Time and place of making, filing, publishing, etc.—Under the New York statute report must be made within the twenty days *after* January 1. A report made within twenty days *before* January 1, is a nullity. *Cincinnati Cooperage Co. v. O'Keefe*, 120 N. Y. 603, affirming S. C., 44 Hun, 64. The report may be filed and published within a reasonable time after the expiration of the twenty days. *Cameron v. Seaman*, 69 N. Y. 306; *Butler v. Smalley*, 101 N. Y. 71; contra, *Gildersleeve v. Dixon*, 6 Daly, 76; *Chandler v. Hoag*, 2 Hun, 618.

In the first of the above cases the report was completed on January 20, and was mailed the same day to the county clerk, who received and filed it on January 22. On January 21, a copy was mailed to the nearest newspaper and was published on January 24. This was held to be a compliance with the

statute. In the second case the report was made on the 17th and given to the secretary to file and publish. It was duly published on the 18th, but through some mistake was not filed. On February 8, the secretary petitioned for an order of court to file the report *nunc pro tunc* as of January 17. On February 18, an order was made in accordance with the petition and the report filed pursuant to the order. It was held that the trustees were not liable.

Under the New York statute where there is no newspaper published in the town, city or village where the business of the company is carried on, the report must be published "in some newspaper published nearest the *place* where the business of the company is carried on." The word "*place*" here means the town, city or village where the business is carried on as the case may be, and not the particular location or premises of the company. Therefore, a publication in a newspaper nearest the town was held sufficient, though there was another newspaper nearer the premises of the company. *Cameron v. Seaman*, 69 N. Y. 396. But it is said that a publication in either newspaper would have been a substantial compliance with the statute.

Where a corporation was required to make an annual statement, without the particular time being specified, it was held that it was not in default until the expiration of the whole calendar month corresponding to the month of the preceding year in which the last statement was made. *Bond v. Clark*, 6 Allen, 361.

9. *Trustee cannot sue his co-trustees.*—A trustee cannot recover against his co-trustees on the ground of a default for which he is himself responsible under the statute. *Easterly v. Barber*, 65 N. Y. 252; *Bronson v. Dimock*, 4 Hun, 614; *Briggs v. Easterly*, 62 Barb. 51. Nor can such a suit be maintained by the assignee of the trustee, if the assignment was made after the default occurred. *Ibid.* It will be sufficient to bar a recovery that one has acted as trustee, though he may not be legally such. *Easterly v. Barber*, 65 N. Y. 252. But where a trustee assigns a claim against the corporation absolutely and for a valuable consideration before any default has occurred, the assignee can maintain a suit against the other trustees for a default subsequently occurring, though the assignor may be guilty of the same default. *Cornell v. Roach*, 101 N. Y. 373; *Chemical National Bank v. Colwell*, 14 Daly, 361.

10. *Defenses.*—The trustee can make the same defenses against the validity of the debt which the corporation could make. *Jones v. Barlow*, 63 N. Y. 202. And he will be precluded from setting up defenses which the corporation is estopped from making, as that the debt arises out of a contract made by the plaintiff, a corporation, without authority of law, the debtor corporation having received the full benefit of the contract. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. It is no defense that plaintiff holds the notes of the company for the debt, or that judgment has been entered upon such notes. *Jones v. Barlow*, 63 N. Y. Supr. Ct. 142; *Deming v. Puleston*, 55 N. Y. 655; S. C., 85 N. Y. Supr. Ct. 309. Nor that the plaintiff has recovered judgment against a stockholder on the same indebtedness. *Vincent v. Sands*, 12 Abb. Pr. (N. S.) 370. Nor that the company is indebted to the defendant more than the amount of the plaintiff's claim. *Morey v. Ford*, 83 Hun, 446.

One who has received the bonds of the company, knowing that they have been diverted from the purpose for which they were authorized to be issued,

cannot recover on them against a trustee. *Kirkland v. Kille*, 99 N. Y. 390. Nor can there be any recovery upon a debt created against the corporation by the fraud of the creditor. *Adams v. Mills*, 60 N. Y. 583.

11. *The statutes in question are penal.*—This is the universal doctrine of the cases with the single exception of *Howell v. Roberts*, ante, p. 365. *Garrison v. Howe*, 17 N. Y. 458; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Miller v. White*, 50 N. Y. 187; *Adams v. Mills*, 60 N. Y. 536; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Wiles v. Suydam*, 64 N. Y. 173; *Loose v. Bullard*, 79 N. Y. 404; *Bonnell v. Griswold*, 80 N. Y. 128; *Bruce v. Platt*, 80 N. Y. 379; *Knox v. Baldwin*, 80 N. Y. 610; *Duckworth v. Roach*, 81 N. Y. 49; *Stokes v. Stickney*, 96 N. Y. 323; *Rector, etc., of Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Kirkland v. Kille*, 99 N. Y. 390; *Butler v. Smalley*, 101 N. Y. 71; *Gadsen v. Woodward*, 103 N. Y. 242; *Blake v. Griswold*, 104 N. Y. 613; *Whitaker v. Masterton*, 106 N. Y. 277; *Allen v. Clark*, 108 N. Y. 269; *Gregory v. German Bank*, 3 Col. 332; *Breitung v. Lindauer*, 37 Mich. 217; *Cable v. McCune*, 26 Mo. 371; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Chase v. Curtis*, 113 U. S. 452. As to the consequences which flow from the statute being penal, see note to *Cochran v. Weichers*, ante, p. 377.

12. *Suits by assignee of claim.*—The assignee of a debt against the corporation can maintain the suit against the directors. *Bolen v. Crosby*, 49 N. Y. 183; *Stokes v. Stickney*, 96 N. Y. 323; *Cornell v. Roach*, 101 N. Y. 373; *Allen v. Clark*, 108 N. Y. 269; *Chemical National Bank v. Colwell*, 14 Daly, 361; *Pier v. George*, 14 Hun, 568. And where the claim against the corporation has been reduced to judgment, the assignment of the judgment carries with it the original claim or debt on which it is founded and all rights and remedies for its collection, including the remedy against the trustees. *Bolen v. Crosby*, 49 N. Y. 183. After assignment and notice a release by the assignor is of no validity as to the assignee. *Bolen v. Crosby*, 49 N. Y. 183.

13. *"Intentional neglect."*—Where the statute only makes the directors or trustees liable in case of *intentional neglect* to file a report, a neglect due to oversight or forgetfulness is not within the statute. *Breitung v. Lindauer*, 37 Mich. 217. But intentional neglect may be inferred from actual neglect unexplained. *Van Etter v. Eaton*, 19 Mich. 194.

14. *Compelling report by mandamus.*—It is said in *Smith v. Seele*, 8 Neb. 115, that the stockholders of a corporation, who are made liable for the debts of the company in case of failure of the president and directors to publish a certain notice as to the indebtedness of the company, may compel the proper officers by *mandamus* to give the notice.

COPPAGE V. HUTTON.

(34 N. E. R. 112; 124 Ind. 401.)

1. **CORPORATIONS. LIABILITY ON SUBSCRIPTION TO STOCK.** Suit by the receiver of an insolvent corporation to recover upon a stock subscription. The defendant subscribed the articles of association which contained a subscription

to the stock of the proposed company, but he did not acknowledge them. The statute required that the persons who desired to form a corporation, should make, sign and acknowledge a certificate setting forth certain things. The certificate in this case was acknowledged by only seven out of eighty-three subscribers. Held, that the defendant's subscription was not complete without acknowledgment and that there could be no recovery against him.

Kennedy & Kennedy and *Ristine & Ristine* for appellant.
Wright & Sells for appellee.

ELLIOTT, J. The appellant sues as the receiver of an insolvent corporation, and seeks to recover a subscription which he alleges the appellee made to the capital stock of the corporation. It is alleged that the appellee, with others, signed articles of association, and that he agreed to take two shares of the capital stock, and pay therefor \$100. The introductory clause of the articles of association reads thus: "We, the undersigned, agree to take the stock, in the amount set opposite our names, in a company to be organized for manufacturing and selling the Williamson Straw-Stacker." There were eighty-three signers, and seven of them acknowledged the execution of the articles of association before a notary public, and the instrument was duly recorded. It is also alleged the \$8,000 of stock was subscribed; that the company was duly organized, and a board of directors elected.

There can be no doubt, under the authorities, that a valid subscription to the capital stock of a corporation may be made by signing the preliminary articles. Such a subscription becomes enforceable upon the perfection of the corporate organization according to law, under the articles of association. *Miller v. Gravel-road Co.*, 52 Ind. 51; *Nulton v. Clayton*, 54 Iowa, 425; 6 N. W. Rep'r, 685; *Warehousing Co. v. Badger*, 67 N. Y. 294; *Cravens v. Cotton-Mills*, 120 Ind. 6; 21 N. E. Rep'r, 981. If the promise of the appellee is not binding, it must be for some other reason than that it was made before the organization of the corporation was fully effected. The statute requires that the persons who desire to organize a corporation shall "make, sign and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate in writing," setting forth therein certain enumerated things. R. S., § 3851. The contention of the appellee is that the promise is not effective, because the complaint shows that only seven of the eighty-three signers acknowledged the cer-

tificate. It seems quite clear, under the decision of this court in *Furnace Co. v. Herkimer*, 46 Ind. 142, that the mere signing of the paper was not sufficient to complete the obligation, and that, in order to make valid and effective articles of association against all who sign, all must acknowledge them as the statute requires. Here it affirmatively appears that seven only of the signers acknowledged the execution of the instrument, and it cannot be inferred that those who did not acknowledge it remained bound by its terms. As to them, the instrument was incomplete; and it is quite well settled that an incomplete subscription cannot be enforced. *Railroad Co. v. Mabbett*, 58 N. Y. 397; *Reed v. Railroad Co.*, 50 Ind. 342; *Railroad Co. v. Reed*, 83 Ind. 9; *Williamson v. Association*, 89 Ind. 389. It is, however, argued by appellant's counsel that the complaint does affirmatively show that the corporation was organized; but this does not meet the question, for it may well be that it was organized without the appellee as a stockholder. The fact that he did not acknowledge the instrument as the law requires, implies that he did not become a stockholder; and there is nothing in the complaint which rebuts or opposes this implication. It devolved upon the plaintiff to remove the inference, if he could. As the appellee did not acknowledge the instrument as the law requires, he did not become a stockholder: and, if he were insisting that he was entitled to the number of shares set opposite his name, it is quite clear that the corporation might successfully resist his claim, since it is obvious that only those who acknowledged the articles of association as the law requires can successfully insist upon their right to stock. If the appellee cannot be regarded as a stockholder, then it seems quite clear that he did not bind himself by simply signing the articles of association. Whether a good complaint can be framed is not the question before us, for the only question presented by the record is as to the sufficiency of the complaint as it is written.

Judgment affirmed.

Corporations — incomplete subscription to stock. — *Dutchess, etc., R. Co. v. Mabbett*, 58 N. Y. 397; *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *Belfast, etc., Ry. Co. v. Moore*, 60 Me. 561; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Bucher v. Dillsburg, etc., R. Co.*, 76 Penn. St. 806.

MASONIC TEMPLE ASSOCIATION V. CHANNELL.

(45 N. W. R. 716; 43 Minn. 353.)

1. CORPORATIONS. SUBSCRIPTION TO STOCK. PAROL CONDITION. When a subscriber to the stock of a corporation is sued on his written subscription, it is incompetent to prove an oral condition to the subscription.

2. WHOLE STOCK MUST BE SUBSCRIBED BEFORE SUBSCRIPTION PAYABLE. The statute (§ 4, chap. 84, Gen. St. 1878) does not abrogate the common-law rule that, where the charter or articles of a corporation, or the terms of subscription to its capital stock, do not provide otherwise, payment of a subscription cannot be required till the whole capital stock is subscribed.

3. WAIVER OF THIS CONDITION. But the subscriber may waive that defense. Acts done by him, as stockholder or director, which constitute a part of the business for which the corporation is formed, and which from their nature assume it to be ready for business, and evince a willingness to enter upon that business, with the stock already subscribed, will amount to a waiver.

4. Certain acts of defendant as a director held a waiver.

Gillfillan, Belden & Willard for appellant. *Ankeny & Merrill* and *Little & Nunn* for respondent.

GILLFILLAN, C. J. The action is upon defendant's subscription to the capital stock of the plaintiff. Upon a trial without a jury, the court below ordered judgment for the plaintiff, and from an order denying defendant's motion for a new trial he appeals.

The appellant makes the points that the plaintiff never accepted his subscription, it having been made before the corporation was organized; that one of the calls or assessments upon the subscribers was not properly made, because it was ordered at a meeting of the directors at which there was not a quorum present; and that appellant had not due notice of four of the calls. Upon all these points the court found the facts against him, and the evidence sustains the findings.

He also complains that the court below excluded evidence offered by him that, at the time of subscribing, he orally made it a condition that the corporation should incur no debt. As the contract of subscription was in writing, of course the evidence was incompetent.

The chief matter of defense was that the whole capital stock of the plaintiff has not been subscribed. No question is made that, at the common law, when the charter or articles of incorpo-

ration, or terms of the subscription, make no different rule, payment of subscription to the capital stock of a corporation cannot be required until the whole amount of stock has been subscribed. There were solid reasons for the rule—reasons based not only on considerations of public policy, but on the presumed understanding and intention of the subscriber to stock. The amount of capital stock of a corporation is presumed to be fixed at what the parties interested suppose will be required for the successful prosecution of the enterprise or business for which it is formed; and, while one might be willing to take stock if such amount is to be raised before the enterprise is to be entered upon, he might not be willing to take and pay for it, leaving it uncertain that the requisite amount will be raised. It is, therefore, implied in the contract of subscription, as a condition precedent to its being of force, that the entire amount of stock shall be subscribed for. Of course, if the articles of incorporation provide that payment of subscriptions may be called for before the whole stock is subscribed, that, as between the parties, is binding. We do not think the clause in section 4, chapter 34, General Statutes 1878 (being in the part of the chapter pursuant to which this plaintiff was organized), “when articles are filed, recorded and published as aforesaid, the persons named as corporators therein become a body corporate, and are authorized to proceed to carry into effect the objects set forth in said articles in accordance with the provisions of this title,” was intended to abrogate, as between the corporation and the subscribers to its stock, the wholesome rule of the common law we have referred to. Whether it bars the right of the state to object to a corporation proceeding with its enterprise before its stock is fully subscribed for, need not be considered in this action.

It may be regretted that there has been any relaxation of that rule. But it is so thoroughly established that a subscriber to stock may by his acts debar his right, when called upon to pay for his stock, to object on the ground that the entire stock has not been subscribed for, as to be no longer an open question. The appellant does not question it. The rule is stated in Cook Stocks, § 181: “A subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express, or implied from the acts or

declarations of the subscribers." The appellant claims that the waiver must amount to an estoppel; the respondent, that acts or declarations of a subscriber showing an intent not to object that the full stock has not been subscribed are sufficient, although a technical estoppel may not be shown. Some of the cases cited use the word "waived," others, the word "estopped." An estoppel *in pais*, as the word is usually employed and applied, includes the fact that the party claiming the estoppel relied upon and acted upon the acts or declarations, so that he will be prejudiced if the other party is not held to them. We do not find that the cases referred to using the word "estoppel," and holding that the subscriber was or was not estopped, use the word in this sense. Thus, in *Railway Co. v. Lacey*, 3 Younge & J. 80, certain acts were held to estop the defendant, though it did not appear that either the corporation or other subscribers had in fact been influenced by his acts; the court only saying that others may have been thereby induced to subscribe. So, in *Hager v. Cleveland*, 36 Md. 476; *Garling v. Baechtel*, 41 Md. 305; *Schloss v. Trade Co.*, 87 Ala. 411; 6 So. Rep'r, 360; *Corwith v. Culver*, 69 Ill. 502; *Turnpike Road Co. v. M'Conahy*, 16 Serg. & R. 140; *Clark v. Navigation Co.*, 10 Watts, 364, — the courts, in stating what will estop the subscriber, or prevent his being heard to make the objection, refer only to his acts, and do not include the fact that they did influence others. If a technical estoppel were required to prevent a subscriber withdrawing his subscription on the ground that the full stock has not been subscribed, much fraud might be committed; for, if it must be shown that the corporation or some subscriber, of whom there may be many hundreds or even thousands, was in fact influenced by the acts of the subscriber who seeks to withdraw, it might be impossible to prove the fact, even though it exist. The safer rule in such a case is that, if his acts are of such a character that either the corporation or subscribers may have been induced by them to act, and will be prejudiced if he be permitted to withdraw, he shall be held to have waived, or to be estopped to assert, the defense. It is immaterial which word is used, except, perhaps, for the sake of strict verbal accuracy.

There are a great many decisions determining what acts will and what will not prevent the subscriber making this defense.

It would be unprofitable to refer to the cases in detail, for they are not entirely agreed; some cases holding certain acts to be sufficient, others holding similar acts insufficient. The general rule we deduce from all of them is that participation in acts done for perfecting the organization of the corporation, and setting it on its feet for business — such as preparing and procuring the execution of the articles, procuring subscriptions to its stock, preparing by-laws for its government, and the like — will not be regarded as a waiver of the defense, or as an estoppel against asserting it, for these are things proper, and to some extent necessary, to be done, although the full amount of stock be not subscribed, but that his acts as stockholder or director, the doing of which constitutes a part of the business for which the corporation is formed, and which from their nature assume it to be ready for that business, and evince a willingness to enter upon that business, with the stock already subscribed, will be sufficient.

Tested by this rule, the defendant had waived his right to object that the whole amount of stock was not subscribed. The enterprise for which the corporation was formed was the erection and maintenance of a building in the city of Minneapolis. Defendant was one of its first board of directors. He was present at the first meetings of the board, and took an active part in the matter of selecting a site for the building, and ascertaining upon what terms a site could be purchased, and was chairman of a committee appointed for that purpose, reported in favor of a particular site, and voted on a motion in favor of that site — voted upon, though against, a motion to adopt another site. It was not until the board had determined upon the latter site that he made any objection that the stock was not all subscribed. Up to that time he was willing the directors should proceed with that part of the business of the corporation. The articles of incorporation did not provide for constructing a building on a designated site, if it could be obtained, in which case the ascertaining if it could be got might be deemed preliminary to entering on the business of the corporation; for its going on would depend on that. The articles contemplated the erection of the building on any site that the corporation might select and purchase. The selection of the site was part of the business for which it was organized — as

much so as the purchase after the selection, or constructing the building after the purchase.

Order affirmed.

Corporations—subscription to stock—parol agreement or conditions. See *Cook on Stock and Stockholders*, §§ 187, 188; *Upton v. Tribilcock*, 91 U. S. 45; *Swartwout v. Michigan, etc., R. Co.*, 24 Mich. 389; *North Carolina R. Co. v. Leach*, 4 Jones L. 340; *Kennebec, etc., R. Co. v. Waters*, 34 Me. 399.

ALLING ET AL. V. WARD ET AL.

(24 N. E. R. 551; — III. —.)

1. **CORPORATIONS. LIABILITY OF PURCHASERS OF "TREASURY STOCK" ISSUED AS FULLY PAID.** The subscribers to the stock of a corporation, before any thing was paid thereon, surrendered it to the corporation, and it was then sold to themselves and others at from five to twenty per cent of its face and issued as fully paid. The purchasers knew that the corporation only received for its stock the amounts which they severally paid. Held, that they were liable to creditors of the corporation for the difference between the par value of the stock and the amount paid therefor.

2. **LIABILITY OF SUBSCRIBERS TO STOCK SURRENDERED TO CORPORATION AND SOLD BY IT.** It was also held that the original subscribers for the stock were not jointly liable with the purchasers thereof for the amount unpaid thereon, under a statute which made the assignor and assignee of stock jointly liable for the amount unpaid thereon, the said subscribers not being assignors of the stock.

3. **DECREE DISSOLVING CORPORATION.** On a bill filed by creditors against the corporation and its stockholders to reach unpaid subscriptions, a decree was entered which, among other things, dissolved the corporation. It appeared that all its property and assets were gone and that it had long before ceased to do business. Held, that the decree was proper.

4. **DECREE ASSESSING STOCKHOLDERS A UNIT. WHEN REVERSED AS TO ONE, MUST BE REVERSED AS TO ALL.** In this case there had been a former decree finding the amount to be raised from unpaid subscriptions and the amount to be paid by each stockholder. On the appeal of certain stockholders this decree was reversed. Subsequently the decree now appealed from was entered, which was for a different amount. Held, that an appellant from the last decree, who did not appeal from the former decree, could not complain of the former reversal as to him, especially as that decree required him to pay a larger sum.

Hutchinson & Luff for appellants. *Walter M. Howland* for appellees.

SHORE, J. This bill is filed by and in behalf of creditors of an insolvent corporation, the Papillon Manufacturing Company, against its stockholders, to subject their unpaid subscriptions for stock to the payment of the debts of the company, and to wind up and close its affairs. Section 8 of the act in reference to corporations for pecuniary profit (R. S., chap. 32) creates a liability against stockholders for the amount unpaid upon their capital stock. That section provides: "Each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided." And further: "No assignor of stock shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor, jointly with the assignee, until the said stock shall be fully paid. * * * Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon to the extent, and in the same manner, as if he had been the original subscriber." Section 25 of the act provides that, "if any corporation or its authorized agents shall * * * allow any execution or decree of any court of record for the payment of money, after demand made by the officer, to be returned, 'No property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who are stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suits; and each stockholder may be required to pay his *pro rata* share of such debts or liabilities, to the extent of the unpaid portion of his stock, after exhausting the assets of such corporations." These two sections, having reference to the same subject—the liability of stockholders, and the remedies by which to enforce the same—should be so construed that each may stand, and effect be given to the provisions of each. The first section creates the liability of the stockholder, and defines its extent, and also makes his assignee equally and jointly liable with him. Section 25 authorizes creditors of the corporation to bring suits in equity against the corporation and stockholders to enforce the liability of the latter, if the corporation does, or fails to do, any act subjecting it to a forfeiture of its charter, or fails to make payment, or permits execu-

tions to be returned, "No property found," after demand by the officer, or shall dissolve, or cease to carry on its business as therein provided. The liability of the stockholder is for his unpaid stock.

To the extent it is unpaid, he is liable for the debts and obligations of the corporation. When the liability is once discharged by payment to the corporation, a subsequent assignee or purchaser will take the stock relieved from the burden imposed by the statute. *Thebus v. Smiley*, 110 Ill. 316.

The first assignment of error presents the question whether the stock of appellants was not full paid-up stock, and, therefore, not liable to assessment. It appears from the evidence that before the issue of stock, or at least before the issue of the stock of appellants, part of the capital stock was transferred upon the books of the company to the company itself, apparently under the belief that the company thereby became the legal holder and owner thereof, and that it could thereafter be put upon the market at less than its par value. It was, therefore, called "treasury stock." On this theory the corporation sold a great portion of such stock to its subscribers at prices ranging from five to twenty per cent of its par value. On February 12, 1883, the following order or resolution was entered upon the books of the corporation: "On motion of Mr. Nourse, the market value of the capital stock was placed at twenty cents per dollar until further notice." Mr. Holland testified as follows: "The cash payment—the price we had sold the stock at, that is to be paid in, the first payment—was \$10 a share. We afterward raised the price to \$20 a share—twenty paid in. The market price was fixed under the by-laws." He then quotes the resolution before mentioned, and says: "Stock was sold under that order to Mr. Alling and to Mr. Clark. Prior to that time, we had sold at five cents and ten cents on the dollar. I sold Mr. Dunham his stock. He paid ten per cent." Of this treasury stock, Clark, Lotz and Nourse each became the holders and owners or subscribers for one hundred shares, aggregating one-half of the capital stock of the company. Appellants now contend that, after this transfer of the capital stock to the treasury of the corporation, it was held, and might be sold, as any other property of the company, and that they purchased their stock, in good faith, as full-paid stock, and that they are not liable to assessment under the statute. It is also contended that the certifi-

cates of stock indicated on their face that the stock was paid-up stock. These certificates read: "This is to certify that ——— is the owner of one hundred shares of capital stock of the Papillon Manufacturing Company," etc. Receipts were given to some of the purchasers, one of which reads: "Papillon Manufacturing Co., 50 Michigan ave. Chicago, Feb. 16, 1883. William G. Hubbard, Esq. — Dear Sir: I hereby acknowledge the receipt of your ck., number 3,411, five hundred dollars (\$500), in full for one hundred shares of stock, certificate No. 47. Yours respectfully, L. C. F. Lotz, Treasurer." The question does not arise here between the corporation and its stockholders, but between the insolvent corporation and its creditors. In *Union Mutual Life Ins. Co. v. Frear Stone Manuf'g Co.*, 97 Ill. 537, it was held that the capital stock of the corporation is a trust fund that the directors may not give away or misappropriate to the prejudice of parties who may deal with the corporation, and that any device by which members of the corporation seek to avoid the liability imposed upon them by law is void as to creditors, whether binding or not as between themselves, or between them and the corporation. Nor is it in the power of the shareholders, by private agreement with the corporation, to make the shares of the stock non-assessable, so as to excuse payment of such stock at its par value as against creditors. *Melvin v. Insurance Co.*, 80 Ill. 446; *Zirkel v. Opera House*, 79 Ill. 334. The law sought to be enforced in this case is intended to protect persons dealing with corporations; and it should not, if susceptible of any other, receive such construction as will defeat the intention of the legislature. It is clear that each of these parties, in procuring stock from the corporation, knew that the corporation was not receiving par value therefor. They purchased stock, and took it of the company, at from one-twentieth to one-fifth of its face value, thereby reducing the capital of the company, in fact, to one-fifth or one-twentieth of its authorized capital, upon the faith of which the public were authorized to deal with it. The plan pursued in this case was but a device to evade the law, and to defeat its useful and wholesome provisions. Clark, Lotz and Nourse having each subscribed for a greater number of shares of the capital stock, those actually taken by them will be held as though issued to them under their several subscriptions, and they cannot be

heard to say that they are purchasers from the corporation of paid-up stock. They cannot defeat their liability to the creditors of the corporation by subscribing for the stock, and then surrendering it to the corporation, and taking it from the corporation, which they controlled and managed, at a tenth or a twentieth of its value. The amount paid by them will, in equity, be treated as a payment upon their stock; and they will be held liable for their *pro rata* share to the creditors of the insolvent corporation.

It is also claimed that the decree is erroneous for the reason that Clark, Lotz and Nourse are not held liable for all of the stock; and appellants say and insist that they should be held liable jointly with the assignees of such stock. This is based upon section 8 of the act, which is: "No assignor of stock shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor jointly with the assignee," etc. The answer to this is apparent. They subscribed for no stock which they, or either of them, assigned to other stockholders. To create the joint liability imposed, they must have assigned stock issued to them to appellants, or to other persons who assigned the same. This they did not do, but returned the stock to the corporation itself, which again issued the same to appellant. The corporation itself cannot be held liable jointly with the subscriber who surrenders his stock to it. If there was any doubt in respect of this point, it will be removed by a reading of the last clause of the section referred to, which is: "Every assignee or transferee of stock shall be liable to the company for the amount paid thereon," etc. It is manifest that it was not intended, by this provision, to make the corporation liable to itself or to its creditors. It is already liable to them. Clark, Lotz and Nourse never in fact owned the stock. They failed to take it, and manifestly never intended to take and pay for it; and when they surrendered their right to take the same, and it was turned in to the treasurer, the corporation had no dealings with third persons. Before the corporation has incurred liabilities, we perceive of no reason why it may not forfeit stock for non-payment.

It is next complained that the decree is erroneous in that it dissolves the corporation. All its property and assets were gone, and it had long ceased to transact business. It was already defunct; and it is not shown that it had any thing, tangible or in-

tangible, of any value, or that its continued existence would be of the slightest advantage to any of its stockholders. It is not seen that the decree in this respect was prejudicial to appellants, or that the corporation, being kept alive, could serve any useful or proper purpose. If it was here complaining, the answer would be that its dissolution was authorized by the statute. *St. Louis & S. C. & M. Co. v. Sandoval, C. & M. Co.*, 116 Ill. 170; 5 N. E. Rep'r, 370.

Appellant Dunham assigns for error that this decree was improperly rendered, as to him, for the reason that he did not appeal from the first decree rendered, which was reversed upon the appeal of others in the appellate court. As the first decree required him to pay a much greater amount than the present decree does it is not observable in what way he was injured. But, aside from this, when a judgment or a decree is a unit, a reversal at the instance of one party operates as a reversal as to all. In this case the reversed decree found the whole sum to be raised from the unpaid subscriptions, and the part each defendant was to contribute, and its reversal made it necessary to find a different gross sum to be thus raised. This, of course, changed the sum each was to pay; and a reversal upon the appeal of any one of the defendants necessarily vacated the decree as to all. "Where there are several dependent judgments, and the principal one is reversed, the others cannot be supported." *Jaques v. Cesar*, 2 Saund. 101aa; *McJilton v. Love*, 13 Ill. 486. Where, however, the interest of the several parties against whom a judgment and a decree is rendered are several and independent, a reversal will operate only in favor of the parties who procure it. *Enos v. Capps*, 12 Ill. 255; *Rees v. Chicago*, 38 Ill. 323; *Railroad Co. v. Reno*, 123 Ill. 273; 14 N. E. Rep'r, 195. It is manifest that this appellant cannot complain of the decree in this respect. We find no substantial error in the record, and the judgment of the appellate court will be affirmed.

Stockholders — Liability of the purchasers of stock fictitiously issued as fully paid.— This question is fully considered in note to *Libbey v. Tobey*, ante, p. 281.

STATE V. HEIDENHAIN.

(7 So. R. 621; — La. Ann. —.)

1. MUNICIPAL CORPORATIONS. ORDINANCES. SMOKING IN STREET-CARS. The ordinance adopted by the council of the city of New Orleans prohibiting smoking in the street-cars is constitutional and valid.

2. The police power delegated to the city in section 7 of the charter gives ample authority for the enactment of the ordinance.

3. NUISANCE. POWER OF CITY COUNCIL TO DETERMINE WHAT IS. There is much discretion left to a municipal corporation for determining what is a nuisance, and the exercise of this discretion will not be judicially interfered with unless the corporation has been manifestly unreasonable and oppressive, invaded private rights, and transcended the authority granted to it.

4. To determine what a nuisance is, is a question of fact.

5. The city council of New Orleans, to a certain extent, is vested with legislative authority; and it is vested with that discretion, within its authority, common to all legislative bodies. Within the exercise of this legislative discretion, it has authority to determine what is a nuisance, and to pass the necessary ordinances to suppress it.

Henry Heidenhain, E. H. McCabb and Griault Farrar for appellant. *F. McC. Hyman* for the state.

McENERY, J. The defendant appeals from a conviction by the first recorder's court of the city of New Orleans for a violation of ordinance No. 4,197, adopted January 2, 1890. For two distinct and separate violations of the ordinance, he was for each violation sentenced to pay a fine of \$25, or suffer thirty days' imprisonment. The ordinance is as follows: "Whereas, the custom of permitting smoking in the street-cars of this city is a most vile and objectionable one to the majority of our citizens, especially to the ladies, who are entitled to that courtesy and consideration due to their sex; and whereas, this alone, of all the cities of the Union, allows such a discomfort to those of its citizens who ride in the public cars: Be it resolved that, from and after the promulgation of this ordinance, smoking in any street-car of this city is hereby prohibited, and shall hereafter be considered as a misdemeanor, and any one so offending, or any driver of a street-car who permits such an offense, shall be fined not less than \$5, nor more than \$25, or imprisoned not less than five days, or more than thirty days, recoverable by the recorder of the district in which the offense shall be committed. And be it further

resolved, that one-half of any money thus recovered shall be the property of the party giving such information and testimony to the recorder as will lead to the conviction of the offender. Be it further resolved, that all laws or parts of laws in conflict with the above be, and the same are hereby, repealed. Adopted by the council of the city of New Orleans, January 2, 1890."

The defense is (1) the unconstitutionality of the ordinance; (2) that the city of New Orleans is without power or authority, under her charter, to pass such an ordinance; (3) that the ordinance in question is vague, indefinite and insufficient in its terms, and does not define what acts shall constitute a violation or infringement; (4) that it imposes upon the drivers of street-cars duties and functions beyond the powers of the common council.

The ordinance does not deprive the defendant of personal liberty, nor does it invade any right of private property. Smoking is not made an offense, but it is prohibited only in a certain designated place.

The third and fourth grounds are without merit. The ordinance makes it specifically an offense to smoke in a street-car. The street-car drivers and the car companies are not complaining of the ordinance.

The several street-railroad companies have adopted the above ordinance as a part of their regulations, and prohibited smoking in all their cars immediately after the passage of the ordinance. When the defendant entered the car, there was conspicuously displayed a card notifying him that smoking was prohibited in that particular car.

A nuisance belongs to "that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct, working an obstruction of or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage." Wood Nuis., § 1. There is no doubt of the fact that smoking in the street-cars in the city of New Orleans had caused to a great majority of the people using them material annoyance, inconvenience and discomfort. This is particularly so in the winter season, when the cars are closed. There is not only discomfort, but positive danger

to health, from the contaminated air. The record establishes these facts. Smoking, in itself, is not to be condemned for any reason of public policy. It is agreeable and pleasant — almost indispensable — to those who have acquired the habit; but it is distasteful and offensive, and sometimes hurtful to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places. There are many other habits in manners and conduct which in some localities and places are not objectionable to the public, but when committed elsewhere may become offensive, and the subject of penal municipal legislation. Smoking may be classed among these subjects of legislation by the municipal corporation.

The police power delegated to the city of New Orleans in its charter gave ample authority to the city to maintain its cleanness and health; to maintain good sanitary conditions in the streets, public places and buildings; to suppress all nuisances; and to impose a fine and imprisonment for the violation of ordinances enacted in pursuance of this delegated power. Section 7, act 20 of 1882. The authority to abate nuisances is a part of the police power vested in all large and populous cities. To determine what is a nuisance is a question of fact.

The city council of New Orleans is, to a limited extent, clothed with legislative authority; and it is vested with that discretion within its powers common to all legislative bodies. Within the exercise of this legislative discretion, it has the authority to determine what is a nuisance, and to enact the necessary ordinances to suppress it. *Kennedy v. Phelps*, 10 La. Ann. 227; *Mayor, etc., v. Gerspach*, 33 La. Ann. 1011. Much is, therefore, left to the discretion of the municipal corporation in determining what is a nuisance, and the discretion thus exercised will not be judicially interfered with unless the corporation has been manifestly unreasonable and oppressive, invaded private rights, and transcended the power given to it. *Dill. Mun. Corp.*, § 379. In the instant case, no private right, either of person or of property, has been violated or invaded. The city council, in passing the ordinance, did not transcend its powers. It had authority under section 7 of its charter, to provide for the public health. It can, therefore, require in public places, theaters, halls, etc., that there shall be ventilation for a supply of fresh air; and in order to pre-

serve the public order and health, and under the general police authority in said section 7, it can compel the owner of public halls and theaters to provide means to prevent fire, and to provide fire-escapes in case of fire, and, in pursuance of the same power, it can, in order to preserve pure and fresh air in crowded halls, and to prevent fire, prohibit smoking in the same. The same authority and the same reasons apply in the prohibition of smoking in street-railway cars. It is essential to health and to comfort to have pure air in them as in any other crowded place.

The facts in the case of *State v. Bright*, 38 La. Ann. 1, have no application to this case. The former involved the question of the power of the city to punish a property-owner for not keeping his sidewalks clean and in repair. This court decided that there was no authority for the city to declare the failure to raise and repair the sidewalks a misdemeanor, and to fix a penalty to the same, as there was an absence of such authority in section 7 of the charter.

The city council had ample authority, under section 7 of the charter to enact the ordinance under which the defendant was convicted.

Judgment affirmed.

NEWMAN V. PHILLIPSBURGH HORSE-CAR COMPANY.

(19 Atl. R. 1102; — N. J. L. —.)

1. HORSE RAILROADS. INJURY TO CHILD. IMPUTED NEGLIGENCE. An infant of tender years is not to be charged with the negligence of the person having it in charge.

2. The plaintiff, about two years of age, being under the care of her adult sister, wandered onto the track of a horse-railroad, and was there run over by the carelessness of the driver of the car. Held, that plaintiff's right of action was not lost even if the sister's carelessness of supervision, in part, was the cause of her injury.

THE plaintiff was a child two years of age. She was in the custody of her sister, who was twenty-two. The former, being left by herself for a few minutes, got upon the railroad track of the defendant, and was hurt by the car. The occurrence took place in a public street of the village of Phillipsburgh. The care-

lessness of the defendant was manifest, as at the time of the accident there was no one in charge of the horse drawing the car; the driver being in the car, collecting fares. The circuit judge submitted the three following propositions to this court for its advisory opinion, viz.: "First, whether the negligence of the persons in charge of the plaintiff, an infant minor, should be imputed to the said plaintiff; second, whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of was not so demonstrably negligent that the said circuit court should have nonsuited the plaintiff, or that the court should have directed the jury to find for the defendant; third, whether a new trial ought not to be granted on the ground that the damages awarded are excessive."

Shipman & Son for plaintiff. *William H. Morrow* for defendant.

BEASLEY, C. J. (after stating the facts as above). There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law. The problem is whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hatfield v. Roper*, reported in 21 Wend. 615. This case appears to have been one of first impression on this subject; and it is to be regarded not only as the precursor, but as the parent, of all the cases of the same strain that have since appeared. The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to; for the facts were these, viz.: The plaintiff, a child, of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was that, as the child was permitted by its custodian to wander into a position of such danger, it was without remedy for the hurts thus received unless they were voluntarily inflicted, or were the product of

gross carelessness on the part of the defendants. It is obvious that the judicial theory was that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that consequently, by force of the well-known rule under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian; and such infliction is justified in the case cited in this wise: "An infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." It will be observed that the entire context of this quotation is the statement of a single fact, and a deduction from it; the premise being that the child must be in the care and charge of an adult, and the inference being that for that reason the neglects of the adult are the neglects of the infant. But surely this is conspicuously a *non sequitur*. How does the custody of the infant justify or lead to the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult; but how can this right to care for and protect be construed into a right to waive or forfeit any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary or even convenient incident of this office of the adult, but on the contrary is quite inconsistent with it; for the power to protect is the opposite of the power to harm, either by act or omission. In this case, in 21 Wend. 615, it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant. But this is a mere assumption, without legal basis; for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance when an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit

by the child, such an engagement would be plainly invalid on two grounds: First, the contract would be *contra bonos mores*; and, second, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made, and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law; for, until the case under criticism, it was absolutely unknown, nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: "The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by any thing to his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him; and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former would seem to be quite evident. Such, subjectively, would be hostile in every respect to the natural rights of the infant, and consequently cannot with any show of reason be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-op-

erative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian: "You and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress." But when such wrong-doer says to the infant: "Your guardian and I, by our joint misconduct, have brought this loss upon you; consequently, you have no right of action against me, but you must look for indemnification to your guardian alone"—a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrong-doer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can in no case be considered to be the blameable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrong-doers to be answerable to a person who is incapable either of self-protection, or of being a participator in their misfeasance. Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglect of the guardian is to be regarded as the neglect of the infant, as was asserted in the New York decision, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglect. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinions touching the subject just discussed are in a state of direct antagonism, and it would, therefore, serve no useful purpose to refer to any of them. It is sufficient to say that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become in any wise a tort-feasor by imputation. 1 Shear. & R. Neg., § 75; Whart. Neg., § 311; 2 Wood Ry. Law,

1284. In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control. Let the circuit court be advised to render judgment on the finding of the jury.

Imputed negligence.— See *Well v. Dry Dock, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 374; *Michigan City v. Boeckling*, 1 Am. R. R. & Corp. Rep. 446, and note; *Chicago City Ry. Co. v. Wilcox* (Ill.), 24 N. E. Rep'r, 419.

BIRMINGHAM MINERAL R. CO. v. SMITH.

(7 So. R. 634; 89 Ala. 305.)

1. **EMINENT DOMAIN. EVIDENCE. OWNER'S RETURN TO THE TAX ASSESSOR.** Where a person is required by law to make a return of his property under oath to the tax assessor with the value of the same, such return is admissible as independent evidence of value as against the owner in a proceeding to condemn a portion of the property embraced in such return.

Hewitt, Walker & Porter for appellant. *W. C. Ward* for appellee.

CLOFTON, J. In a proceeding instituted by appellant to condemn a right of way over the land of appellee, and to determine the compensation to which he is entitled, the former introduced in evidence the assessment rendered by the latter to the tax assessor, sworn to by him, in which the land in question was listed and its value estimated at \$3,400 for taxation for the year 1888. Appellee testified that the tract of land was worth, at the time the award of compensation was made, in December, 1887, by the commissioners appointed by the judge of probate, and, at the time of the trial, \$1,000 per acre; the tract containing thirty-four acres. The valuation in the assessment was made as of the 1st day of January, 1888.

The sole question in the case arises on the following charge, given by the court at the instance of the appellee: "The tax assessment offered in evidence in this case can have no effect except to discredit the defendant, Smith, as a witness in this case." The charge, in effect, declares that the land-owner's sworn valuation of the land for the purpose of taxation is, in condemnation

proceedings, incompetent as independent evidence of value, and limits its effect to the purpose of impeachment. Such is the statement of the rule in 6 Am. & Eng. Cyclop. Law, 622, citing *Railroad Co. v. Henry*, 8 Nev. 165, where it is said that the estimate for taxation, though sworn to by the land-owner, "could have no weight in determining the value of the property in question, incompetent in fact for that purpose, though perhaps admissible to tend to contradict his testimony in chief." The elementary authors state the rule in varied and qualified phraseology. In *Lewis Em. Dom.*, § 448, it is thus stated: "The assessment of property for taxation being made for another purpose, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings;" citing *Railway Co. v. Eddy*, 42 Ark. 527, and *Brown v. Railroad Co.*, 5 Gray, 35. In the first case it was held not to be error to exclude from the jury the valuation of the land made by the assessor for the purposes of taxation on the ground that, being made for a different purpose, it is not a fair criterion of its market value; and in the second case the court says: "It is also questionable whether any valuation made for the special purpose of taxation, and that some years previously to the assessment of damages by the jury, could be a useful or proper aid to the jury in fixing the value of the land, or the damages sustained by the petitioner on the location of the road." We have fully mentioned these various statements of the principle for the reason that our attention has been called to them as sustaining the legal proposition of the charge, and for the further reason that, under our mode of assessment, we cannot adopt the rule as thus stated, though no case has been found expressly asserting the competency of the owner's sworn return as independent evidence of values.

By the revenue law every person liable to taxation is required to render to the assessor all the items of property, and the value of each item, upon which he is liable to be taxed. From this list the assessor makes out the assessment, on which tax payer is required to subscribe an affidavit that the list returned by him to the assessor "contains a full and true statement of the property and other subjects of taxation with which he is chargeable, and of the value thereof." Code, §§ 470-486. The value to be stated

is the market value in money. It is true the assessor is not bound by the owner's valuation, but may himself ascertain and determine the value according to his best judgment, from information, inspection or otherwise; but the owner is required in the first instance to return a verified valuation. A universal rule is that the admissions and declarations of a party are admissible in evidence against him. On this rule it has been held that the declarations of the owner as to the value of the land are competent as independent evidence against him in condemnation proceedings—as evidence bearing upon the value of the property. *Railroad Co. v. Ranck*, 78 Penn. St. 454; *Power v. Railroad Co.*, 56 Ga. 471.

In *Mills Eminent Domain*, § 172, the author states the rule as follows: "The valuation made by the assessor for purposes of taxation is not admissible in evidence, the determination of value having been made for a different purpose. Nor is the return made by the owner conclusive upon him, but is perhaps admissible to contradict his evidence in chief;" which implies that its admissibility is questionable.

That the valuation made by the assessor for purposes of taxation, in which the owner does not participate, is inadmissible, is unquestionably correct, on well-settled principles. But we are unable to discover any sound reason or principle on which it can be held that the owner's sworn valuation of the land, for whatever purpose made, is incompetent as independent evidence of value against him; why it should be regarded an exception to the general rule. The compensation to which he is entitled, or the amount of damages which he will sustain, is the question involved in such cases, and a material element of the damages is the difference between the value of the land before the right of way is taken, and its value after being taken. If his unsworn declarations and admissions are admissible against him, certainly his estimate of the value made under the solemnity of an oath, is equally admissible as a declaration or admission. Such valuation is not conclusive upon him, but dependent for its weight upon the circumstances.

The court erred in giving the charge.

Reversed and remanded.

Eminent domain — admissions of the owner as to value. — In a proceeding to condemn property for public use the statements or admissions of the owner as to its value are competent evidence against him, upon the same principles and subject to the same conditions and limitations as in other cases where the value of property is in issue. *Central Branch U. P. R. Co. v. Andrews*, 37 Kans. 162; *East Brandywine, etc., R. Co. v. Ranck*, 78 Penn. St. 454; *Hobart v. County of Plymouth*, 100 Mass. 159; *Paine v. Woods*, 108 Mass. 160; *Lawrence v. Boston*, 119 Mass. 126; *Chase v. Worcester*, 108 Mass. 60; *Matter of New York, etc., R. Co.*, 33 Hun, 231; *East Pennsylvania, etc., R. Co. v. Hiestler*, 40 Penn. St. 53; *Chicago, etc., R. Co. v. Catholic Bishop*, 119 Ill. 525.

LORD v. MEADVILLE WATER CO.

(19 Atl. R. 1007; 125 Penn. St. 122.)

1. **WATER COMPANIES. RIPARIAN RIGHTS.** The defendant company purchased an acre of land upon which was a spring, which had been accustomed to flow over the plaintiff's land. The company diverted the spring for the purpose of supplying a village with water. Held, that the company, though clothed with the power of eminent domain, acquired no right to the water except as a riparian proprietor, and could not divert it without a condemnation. A judgment in trespass affirmed.

Pearson Church for appellant. *Geo. F. Davenport* for appellee.

PAXSON, C. J. We need not discuss the question presented by the second assignment, for the reason that an examination of the testimony shows conclusively that the jury did not give punitive damages. The verdict, \$41, is within the range of the undisputed testimony.

The remaining assignments refer to the charge of the court and the answers to points. It is not essential to consider them separately. We can better dispose of them by giving our views generally upon the law of the case. This was an action of trespass, brought by Mrs. Lord, a married woman, against the Meadville Water Company, to recover damages for the diversion of a stream of water which, before the injury complained of, flowed over her land. The Meadville Water Company, appellants, was incorporated under the act of 1874, and, it was alleged, had the right of eminent domain for the purpose of supplying the city of Meadville with water. In order to aid in procuring such supply, the

company, in the year 1888, purchased an acre of land near said city, on which was a flowing spring of water, and carried the water from said spring to the city by means of pipes. The plaintiff owns land near this spring, over which the water thereof was accustomed to flow prior to its diversion by the company. She claims that it no longer flows there, and that, by reason of its being diverted out of its natural channel, she is deprived of its use for irrigation and other purposes. This suit was brought to recover damages for such injury.

The questions thus presented are not difficult of solution. By the purchase of this acre of land on which the spring is situate, the company acquired the rights of a riparian owner; neither more, neither less. What its rights as riparian owner are, were sufficiently defined in the recent case of *Haupt's Appeal*, 125 Penn. St. 211; 17 Atl. Rep'r, 436, where it was said: "If the authority of the plaintiff were measured by its rights as riparian owner, it would be slender enough. It might indeed use the water for the domestic purposes incident to the said ten acres of land. If there was a tenant thereon, he could use it for watering his stock, and for household purposes; for any useful, necessary and proper purpose incident to the land itself, and essential to its enjoyment. But that the rights of a riparian owner would justify the plaintiff in carrying the water for miles out of its channel, to supply the borough of Ashland with water, is a proposition so palpably erroneous that it would be a waste of time to discuss it." So we say here: The purchase of the acre of land, including the spring, gave the company the rights of a riparian owner. But such rights were not a justification for the diversion of the water from its natural channel to supply the city of Meadville. It was conceded upon the argument that the company had the right to divert it under its power of eminent domain. But it has never exercised such right. To do so involves compensation to those who are or may be injured by such diversion. Compensation was not made, nor security tendered. While a city or borough, or a company having the right of eminent domain, may take a spring or stream of water to supply a municipality, it can only do so by making compensation to those who are deprived of the use of the water, as provided by the constitution. A taking without compensation is a trespass; as much so as the taking of land by a

railroad company to construct its road without making compensation, or filing a bond with security, as provided by law. Where the power to take exists, it must be exercised according to law. If it is not, the corporation so taking becomes a trespasser, and may be proceeded against as such. It is a mistake to assume that the purchase of this acre of land gave the company an absolute right to the spring of water. The water did not pass by the deed beyond its reasonable use by the vendee as a riparian owner. As was said in Haupt's Appeal, *supra*: "There can be no such thing as ownership in flowing water. The riparian owner may use it as it flows. He may dip it up, and become the owner by confining it in barrels or tanks. But so long as it flows, it is as free to all as the light and the air." The company might have taken this spring under its right of eminent domain, if it possessed such right. For aught that appears, it may do so still; and, after having done so, and made compensation to the riparian owners who are injured thereby, it will be free from suits of this nature. Had it done so in this instance, it would not have had this judgment against it.

We do not regard the question of the plaintiff's title, under the facts of the case, as of any importance. The plaintiff's husband testified that the farm belonged to her, and he is certainly estopped from recovering damages in another suit.

Judgment affirmed.

Eminent domain — water cannot be taken for public use by virtue of riparian right.— A corporation or individual authorized to take water for public use cannot take water from a stream or pond by virtue of being a riparian proprietor on such stream or pond. *City of Emporia v. Soden*, 25 Kans. 588; *Bailey v. Woburn*, 126 Mass. 416; *Ætna Mills v. Waltham*, 126 Mass. 422; *Ætna Mills v. Brookline*, 127 Mass. 69; *Cowdrey v. Woburn*, 136 Mass. 409; *Stein v. Burden*, 24 Ala. 130; *Garwood v. New York Central, etc., R. Co.*, 88 N. Y. 400; *Pennsylvania R. Co. v. Miller*, 112 Penn. St. 34; *Swindon Water Works Co. v. Welts & Berks Canal Co.*, L. R., 7 E. & I. App. Cases, 697; *Earl of Sandwich v. Great Northern Ry. Co.*, L. R., 10 Ch. Div. 707. The rights affected by the proposed taking must be purchased or condemned in the usual way.

EAST END STREET RY. CO. v. DOYLE.

(13 S. W. R. 936; 88 Tenn. 747.)

1. EMINENT DOMAIN. DUMMY ROAD ON HIGHWAY. A street railway, operated by a steam-motor or dummy engine, carrying only passengers and stopping at street crossings like horse-cars, is an additional burden on the fee of the street and cannot be authorized without compensation to the owner of the fee.

Myers & Sneed and *Turley & Wright* for plaintiff in error.
F. P. Edmondson and *J. P. Houston* for defendant in error.

CALDWELL, J. Action by Doyle, an abutting lot-owner, to recover damages from the East End Dummy Railway Company for the alleged wrongful and unlawful construction and operation of its railway line along and upon the highway in front of his property. Verdict and judgment for plaintiff, and appeal in error by defendant.

On the trial below the defendant requested the trial judge to instruct the jury as follows: "If the jury find that the defendant constructed its road through a part of the city to a point five miles into the country, in accordance with its contract with the city and county, its cars being propelled by steam-motor, and used only for carrying passengers, stopping at street crossings to take on passengers, then the court charges you that its construction is not an additional servitude upon the streets or public roads from that contemplated in the dedication." The court refused to give this instruction, and his action in that behalf is assigned as error.

This presents the question reserved in the Smith Case, 87 Tenn. 626; 11 S. W. Rep'r, 709, namely, whether a railway whose cars are propelled by a dummy steam-engine, and used for passengers only, is a burden or servitude on a public street or highway in addition to that contemplated in the original dedication of the land to public use. The reservation was made in that case because the plaintiff therein did not own the ultimate fee in the street, and was not, therefore, in an attitude to be affected by a decision of the question. For reasons stated in that case and in the Bingham Case, to be hereafter cited, an abutting land-owner whose line is in the side, and not the center, of the public highway, is not entitled

to compensation for the imposition of an additional burden on the ultimate fee. Not owing the fee, he can justly claim no compensation for its impairment by a new burden imposed upon it. That is a matter for the owner of the estate out of which the public easement was originally carved, and not for the abutting owner, whose title-papers take him only to the side of the highway, as was true in the *Bingham and Smith Cases*. In the present case the plaintiff's line is in the center of the highway, and to that line he owns the ultimate fee; that is, he has such ownership of the soil that he may resume absolute possession and dominion of it to the center of the highway whenever the original use for which the highway was set apart shall be finally abandoned. The appropriation vested the public with only such part of his fee-simple estate as was necessary to the full enjoyment of the use then in contemplation. Consequently, any thing which diverts the highway from that use, or applies it to another or different use, is the imposition of an additional burden on the reserved estate of the owner, and constitutes a taking of his property for which he may demand and receive just compensation. So, then, the proposition contained in the request for special instruction is a material one in this case, and should have been given or refused, as it may be sound or unsound in law.

It is well settled that an ordinary steam or commercial railway is, and that an ordinary street railway operated with horses is not, an additional servitude on the ultimate fee in the public street or highway; the former being a new and different use, while the latter is but an improved and consistent mode of enjoying the original or ordinary use. *Railroad Co. v. Bingham*, 87 Tenn. 522; 11 S. W. Rep'r, 705; *Smith v. Railroad Co.*, 87 Tenn. 626; 11 S. W. Rep'r, 709, and authorities cited. The distinction between the use by the commercial railway, and that by the horse railway, is so wide and plain that it needs no further comment or illustration. Confessedly, the railway involved in this case is on the line between the two; the equivalent of neither, but partaking largely of the nature of both. Like those upon the commercial railway, its cars are propelled by a steam-engine, with its unavoidable smoke, noise and vibration, though in a less degree; and, like the horse-car line, it transports passengers only, stopping at short intervals upon the highway to take them on and let them

off, while the commercial railway carries both passengers and other freight, receiving and discharging them at regular depots further apart. The size, weight and speed of appellant's trains, consisting usually of a small "boxed" engine and two coaches, are much less than those of the commercial railway trains; but, at the same time, its trains are much longer, heavier and more rapid in transit than the ordinary horse-car. Alike, the commercial railway, and that operated by the appellant, are obvious hindrances to other modes of travel and traffic rightfully enjoyed upon the public highway. Alike, they endanger the lives and property of individuals, for whom, in the aggregate, the original dedication or condemnation was made. There is a difference, it is true; but the difference is in the degree, and not in the kind, of interruption and peril. From the very nature of the case, it is perfectly manifest to our minds that the presence of appellant's track and trains is entirely inconsistent with, and a perpetual embarrassment to, the ordinary use of the public highway. It is utterly impossible to operate such a railway with such trains without greatly obstructing, and rendering more dangerous, other business and travel usually seen, and always allowable, on a public highway. To the extent of this obstruction, and this increase of danger by its appropriation of the highway for its own purposes, there is necessarily a diversion from and inconsistency with the original use; and to that extent the construction and operation of appellant's road is the imposition of an additional servitude upon the ultimate fee of the owners of the soil in the public highway. This does not mean that the trains of appellant are to be banished as unauthorized by law, but simply that their presence and operation in the public highway is an additional burden on the ultimate fee, for which the owner is entitled to compensation.

The charter from the state, and contract with the city and county, authorize the proper construction and use of this railway; but they do not purport to warrant the appropriation of the owner's property without paying him therefor. Even if such was their purport and intent, that could not alter the case, and would afford no sufficient answer to the plaintiff's demand, because the constitution forbids the taking of private property for public use without just compensation. Const., art. 1, § 21. The instruction requested was properly refused. Counsel for appellant have

called our attention to the case of *Newell v. Railway Co.*, 35 Minn. 112; 27 N. W. Rep'r, 839, which we find to be an authority for the proposition requested, and in conflict with the conclusion reached in this opinion. Not agreeing to the reasoning in that case, and the decision of a sister state being at most only persuasive authority, we prefer not to follow it. We have carefully considered the several other assignments of error. None of them are well taken.

Let the judgment be affirmed.

Eminent domain — street railways — rights of abutting owners.—The foregoing decision is undoubtedly sound upon principle. The writer has pointed out the dangers and errors of the contrary view in his work on Eminent Domain. *Lewis Em. Dom.*, § 124. The subject of railroads of all kinds in streets is fully discussed in notes to *McQuaid v. Portland, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 34, and *Taggart v. Newport Street R. Co.*, ante, p. 44.

The following cases in these reports relate to the rights and remedies of abutting owners for railroads in streets. *Steam railroads.* *McQuaid v. Portland, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 34; *Harback v. Des Moines & Kansas City R. Co.*, 1 Am. R. R. & Corp. Rep. 449; *Muller v. Southern Pacific R. Co.*, ante, p. 40; *Burkham v. Ohio & Miss. R. Co.*, ante, p. 88; *White v. Chicago, etc., R. Co.*, ante, p. 138; *Chicago, etc., R. Co. v. Porter*, ante, p. 415; *Glaessner v. Anheuser-Busch Brewing Co.*, ante p. 419. *Elevated railroads.* Note, 1 Am. R. R. & Corp. Rep. 53; *Newman v. Metropolitan El. Ry. Co.*, ante, p. 318; *Tallman v. Metropolitan El. R. Co.*, ante, p. 325; *Powers v. Manhattan Ry. Co.*, ante, p. 353. *Electric, cable and horse railroads.* *Taggart v. Newport Street Ry. Co.*, ante, p. 44, and note.

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Containing references to both the reported cases and the notes.

ABUTTING OWNERS.

See MUNICIPAL CORPORATIONS; RAILROADS; TELEGRAPH AND TELEPHONE COMPANIES.

ACTIONS.

1. *Survival of.* An action by a creditor against a stockholder of a corporation under a statute making the stockholders liable for the debts of the corporation until the whole capital was paid in and a certificate thereof made and filed is not penal, and the action survives against his personal representatives. *Cochran v. Weichers* (N. Y.), 377.

2. As to survival of suits against stockholders and officers of corporations in actions to enforce a statutory liability, see note, p. 396.

ADMISSIONS.

1. Admissions of the owner of property as evidence of its value in condemnation proceedings, note p. 744.

See EMINENT DOMAIN, 29, 30.

AGENTS.

1. Power of insurance agent to waive conditions of policy. *Farnum v. Phoenix Ins. Co.* (Cal.), 72; *German Ins. Co. v. Gray* (Kans.), 459; 84, n.; 469, n.

2. Whether one taking application for insurance is agent of insurer or insured. 469, n.

3. Liability of, for violating ordinance by direction of employer. *City of Duluth v. Mallett* (Minn.), 551.

4. Taxation of, by state, when forbidden by federal constitution. 647, n.

See INSURANCE; INTERSTATE COMMERCE.

AMENDMENT.

See CHARTER.

APPEAL.

1. *Purchaser at foreclosure sale.* A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions, thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. Where not concluded by the terms of

APPEAL — *Continued.*

the decree, any subsequent rulings which determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court. *Kneeland v. American Loan & Trust Co. et al.* (U. S.), 596.

ARBITRATION.

See INSURANCE, 8-11.

ASSIGNMENT.

1. Of claim against corporation carries remedy against stockholders and officers. 719, n., 720, n.

BANKS AND BANKING.

1. *Paying forged check — suit to recover back.* It is the duty of a bank to know the signatures of its depositors and when it pays to an innocent holder a forged check, purporting to be drawn on itself by one of its depositors, it cannot recover the money back. Both parties being equally innocent, the bank must suffer the loss. *Deposit Bank v. Fayette Nat. Bank* (Ky.), 296.

2. *Negligence of bank in not detecting forgery.* In this case the plaintiff continued for nearly five months to pay to the same holders, forged checks of the same tenor, purporting to be drawn by the same person, who was one of its principal depositors, and resided in the same town with the bank. Held sufficient to fix the liability of the bank. *Ibid.*

3. *Power of president to appropriate funds of bank in payment of his private debts — notice.* Suit by the plaintiff, as receiver to recover from the defendant the amount of an overdraft made as follows: The president of the bank was indebted to the defendant and directed him to draw checks on the bank for the amount and they would be paid by the bank and charged to the president. The defendant drew checks for the amount in question, which were paid by the bank, it being understood by the cashier and book-keeper that the checks were paid on account of the president. The president's account was overdrawn at the time. The directors knew nothing of the arrangement. While matters were in this condition, the bank went into the hands of a receiver. Held, that the defendant was liable, that he should have known that the president had no right to appropriate the funds of the bank to the payment of his private debts, and should have seen that the transaction was duly authorized by the directors. *Dowd v. Stephenson* (N. C.), 805.

4. *Insolvency — conflicting claims to proceeds of checks.* C., holding a check upon the defendant bank payable to his order, indorsed the same in blank and delivered it to the H. bank for collection. The H. bank indorsed it "for collection and credit," and sent it to the plaintiff bank, which indorsed it "for collection and remittance," and sent it to the defendant, which charged the check to the drawer and canceled it and mailed its draft for the amount of the check, less its charges, to the plaintiff. The H. bank having failed in the meantime, C. requested the defendant to stop payment of its draft, which it did. The plaintiff bank sued to recover the amount of the draft. Held, that the defendant, having received the check for collection and having made the collection and charged for the service, became the agent of the plaintiff, and that, having delivered to the plaintiff its draft for the proceeds, could not resist

BANKS AND BANKING — *Continued.*

payment of the same on the basis of the legal or equitable rights of a third person who had no privity with either. *Corn Exchange Bank v. Farmers' National Bank of Lancaster, Pa.* (N. Y.), 282.

5. *Duty with respect to care of collaterals and special deposits.* Plaintiff, a customer of the defendant bank, delivered to it bonds, as security for discounts made and to be made. The bank retained the bonds, and from time to time during the space of four years the plaintiff obtained discounts with the bonds as collateral. When the last discounted note was paid, the cashier gave the plaintiff a receipt, stating that the bonds were retained for future like use or safe-keeping, subject to the plaintiff's order. Afterward the plaintiff demanded the bonds and was told that they could not be found. Held, that the bailment was for the mutual advantage of both parties and that the bank was liable for a high degree of care. *Ouderkirk v. Central National Bank* (N. Y.), 357.

6. It appeared that the bank kept no account of securities so held except when in actual use as collateral, made no examinations for the purpose of ascertaining that they were on hand, and in no way looked after their safety. It also appeared that the by-laws of the bank required an examination every three months, by a committee, of all matters pertaining to the affairs of the bank, and that such examination was in fact made every three months of the assets of the bank. Held, that there was sufficient evidence to sustain a finding of negligence. *Ibid.* ¶

7. Evidence of the want of such care as the bailee generally bestows upon his own property, is strong and persuasive evidence of negligence on his part with respect to the property bailed. *Ibid.*

8. The failure of the bank to produce the cashier as a witness, or to account for his absence was a circumstance which afforded an inference against the bank. *Ibid.*

9. Liability for property held on special deposit or pledged as collateral security. 365, n.

SAVINGS BANKS.

10. *Replevin of pass-book.* Plaintiff was a depositor in the defendant bank and had the usual pass-book evidencing his deposit. This was stolen from him. The thief presented the book to the defendant, fraudulently personated the plaintiff, and obtained the money deposited. This was an action of replevin by the plaintiff to recover the book or its value. Held, that the action would lie for the recovery of the book. *Wegner v. Second Ward Savings Bank* (Wis.), 175.

11. *Stolen pass-book — payment to wrong party — liability.* If the bank paid the money in good faith and without negligence to a person presenting the pass-book, having no notice of the loss of the book, it would not be liable to the plaintiff, and whether it did so or not was a question of fact for the jury. *Ibid.*

12. *Same — contributory negligence.* Plaintiff was wounded when the pass-book was stolen and did not know of its loss until after the bank had paid the money. Held, there was no evidence of contributory negligence in not giving notice to the bank. *Ibid.*

BANKS AND BANKING—SAVINGS BANKS—*Continued.*

13. *Same—measure of damages—interest.* The plaintiff was entitled to recover the amount of the deposit with interest at the statutory rate from the date of demand, although the rate paid by the bank was only three per cent. *Ibid.*

14. *Rule requiring notice of withdrawal for benefit of depositor.* A rule of the bank, printed in the pass-book, required thirty days' notice of withdrawals in amounts exceeding \$50. Held, that this rule was for the benefit of the depositor as well as the bank. *Ibid.*

See NEGLIGENCE, 1, 2.

BENEFITS.

See RAILROADS, 44.

BONDS.

MUNICIPAL.

1. *Bona fide holders.* Where there is statutory authority to issue municipal bonds, and the bonds have been executed and issued by the duly constituted authorities and recite that they have been issued in pursuance of and in compliance with the statute, they are good in the hands of *bona fide* holders though the statute has not in fact been complied with. *Inhabitants of the Township of Bernards v. Morrison et al. (U. S.), 35.*

2. *Municipality may be bound through the agency of commissioners appointed by a court.* The fact that the bonds are issued through the agency of commissioners appointed by the court in pursuance of the statute for the special purposes of the act, would make no difference. It is wholly for the legislature to determine by what officers and agencies a municipality shall be bound. *Ibid.*

3. Nor would it matter that the statute did not in terms authorize the commissioners to determine whether the conditions preliminary to the issue of the bonds had been complied with. It was enough that full control in the matter was given to them. *Ibid.*

4. *Limitations—new promise.* In a suit upon municipal bonds which are *prima facie* barred by the statute, a new promise cannot be implied from the fact that the secretary, in reports to the council made within the statutory period, included the bonds in a list of liabilities, nor from the further fact that the city had levied and collected taxes to meet interest due and create a sinking fund for the redemption of bonds theretofore issued, but without specifying any particular bonds. *City of Houston v. Jankouskie (Tex.), 85.*

5. The new promise, to be effectual, must be made by the creditor to his debtor or to some one representing him. *Ibid.*

6. *Collusive suit to avoid bonds—effect.* Where a town procures suit to be brought against itself upon coupons, which it has furnished the money to buy, and for the purpose of having its bonds declared void, and pays all the expenses of the suit, including attorneys' fees on both sides, a decision in such suit pronouncing the bonds void will not stand in the way of a re-examination of the merits of the questions on which the validity of the bonds depends. *Calhoun et al. v. Millard et al. (N. Y.), 514.*

7. *When equity will refuse relief against void bonds—laches.* The petition for the issue of bonds in aid of a railroad was adjudicated to be sufficient, the

BONDS — MUNICIPAL — *Continued.*

bonds were issued for stock of the railroad company and sold to *bona fide* holders for value; the town levied taxes and paid interest on them regularly for nine years, and also paid a small portion of the principal. The railroad was partly built and sold out on foreclosure. Between nine and ten years after the issue of the bonds a bill was filed by tax payers to procure a cancellation of the bonds and for other relief. It was held that, though the bonds were void, the laches and other circumstances of the case were such that equity, in the exercise of a sound discretion, would refuse the relief of cancellation. *Ibid.*

8. *Irregularity in issuing.* A proposition to issue county bonds to aid in construction of a railroad was: "To issue and give to the Lincoln and Northwestern Railroad Company, or to the Blue Valley and Northwestern Railroad Company, \$100,000 of coupon bonds of said Platte county," etc. It was submitted to the voters of Platte county, and adopted by the requisite majority, and the bonds issued duly certified, and delivered to the Lincoln and Northwestern Railroad Company, which built the proposed railroad. Held, that while the issuing and delivering of bonds voted under an alternative proposition would be enjoined if timely application was made for that purpose, yet as, by the terms of the proposition, the commissioners were authorized to issue and deliver the bonds to the one of the companies named which should build the road, and having complied with such apparent authority, their action in the premises was voidable and not void; in other words, the bonds were liable to be set aside at any time before they were duly certified and had passed into the hands of an innocent purchaser for value. *North v. Platte County (Neb.)*, 509.

9. *Effect of laches in bringing suit.* Where there has been great delay in bringing an action, relief may be denied, when, had the application been seasonably made, it would have been granted. *Ibid.*

10. Estoppel to deny validity of. 535, n.

OFFICIAL.

11. Construction and effect of bonds given by officers and agents of corporations to secure the faithful discharge of their duties. *Mowbray v. Antrim (Ind.)*, 445, 450, n.

See TAXATION.

BOOKS AND RECORDS.

1. *Right of stockholders and directors to examine.* A director in a corporation, who is also active in the management of a rival corporation, has no right to examine the records of the former for the benefit of the latter corporation. *Hemingway v. Hemingway (Conn.)*, 802.

2. A director who has gotten possession of any of the records for such a purpose may be forcibly dispossessed thereof by the proper custodian, if the latter can do so without wounding or employing a dangerous weapon. *Ibid.*

3. *Statute construed — mandamus.* A statute of Alabama provides that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records and papers of the corporation, at reasonable and proper times." Held, to apply to national banks within the state, and that *mandamus* would lie to enforce the right. *Winter v. Baldwin et al. (Ala.)*, 402.

BOOKS AND RECORDS—*Continued.*

4. The writ should issue against the officer having the custody of the books, and not against the corporation. *Ibid.*

5. Right of stockholders to inspect books. 304, n.

6. Production of books and papers—practice. *Mather v. Eureka Mower Co.* (N. Y.), 410.

See PLEADING AND PRACTICE, 5.

BUILDING AND LOAN ASSOCIATIONS.

1. *Liability of secretary for funds of the association.* The secretary of a building and loan association gave a bond to the association, conditioned that he would well and truly perform the duties of the office as prescribed by the constitution and by-laws of the association. Held, that he was only required to exercise such care as devolves upon an ordinary bailee for hire, and that he was not liable upon his bond for the value of a note lost, without any fault or negligence on his part. *Mowbray v. Antrim* (Ind.), 445.

CABLE ROADS.

See RAILROADS, 24.

CARRIERS.

DUTY GENERALLY.

1. *Degree of care to be exercised for the safety of passengers.* It is the duty of railroad companies to their passengers to exercise the highest practical care, which capable and faithful railroad men would take, in like circumstances, to provide a track, rolling stock and service reasonably fit and sufficient to safely perform the contract of transportation. *Furnish v. Missouri Pac. Ry. Co.* (Mo.), 620.

2. *Same—duty as to appliances.* The duty of railroad companies as to the number of tracks it should have, the running of separate passenger and freight trains, and the use of safety appliances, vary with the circumstances of the case, depending upon the amount of traffic and other considerations. They are bound to a very high degree of care and diligence in the management of their roads and trains, but are not required to do what is unreasonable or impracticable, though possible. *Arkansas Midland Ry. Co. v. Canman* (Ark.), 311.

3. Duty as to affording passenger information with reference to manner of completing his journey. *Dwinelle v. New York Central, etc., R. Co.* (N. Y.), 492.

EJECTING PASSENGER.

4. *Ejecting passenger from horse car—instructions.* Plaintiff sued for being forcibly ejected from defendant's car. The defense was that the plaintiff refused to pay his fare and used indecent and abusive language. Among other things the court instructed the jury in effect that though the plaintiff did not pay his fare, yet if the defendant's servants threw him off while the car was in motion, without warning and with unnecessary violence, the defendant would be liable. Held, the instruction was correct. *Chicago City Ry. Co. v. Pelletier* (Ill.), 616.

5. *Conduct of passenger justifying expulsion.* The mere fact that a passenger uses vulgar or abusive language so as to attract the attention of other passengers and refuses to desist upon request, will not justify his removal.

CARRIERS — EJECTING PASSENGER — *Continued.*

His conduct should be such as is calculated to annoy and disturb his fellow-passengers. *Ibid.*

6. Liability for ejecting passenger from car while in motion. 619, n.

INJURIES TO PASSENGERS.

7. *Riding on platform of horse-car.* Plaintiff with his wife entered a horse-car for which a crowd was waiting. Plaintiff secured a seat which he gave to his wife who was unable to stand. He then rode on the rear platform until, thinking there was more room in front, he sought the front platform where he stood with one foot on a step and one on the platform, clinging to the railings with his hands. A movement of the passengers loosened his hold and he fell under the car and was injured. Held, a case to go to the jury, both as to the defendant's negligence and the contributory negligence of the plaintiff. *Lehr v. Steinway & Hunter's Point R. Co. (N. Y.), 240.*

8. *Overloading car.* The jury were properly instructed that if the defendant negligently permitted the car to be overloaded and that the overloading caused the accident, the defendant would be liable, unless the plaintiff was guilty of contributory negligence. *Ibid.*

9. *Collision — contributory negligence.* Plaintiff was riding in a compartment-car, on one of the defendant's trains. Being aware from his knowledge of the movement of trains that there was serious danger of a collision, he went into the baggage compartment and stood by the door, prepared to jump, and did jump just before the collision which happened, and was injured. Held, that if the negligence of the defendant had placed him in a peril where jumping was a reasonable precaution, it was liable, even if the plaintiff might safely have retained his seat. *Cody v. New York & N. E. R. Co. (Mass.), 613.*

10. Held, also, that whether the plaintiff was guilty of contributory negligence in leaving his seat and going into the baggage compartment for the purpose he did, was a question for the jury and judgment for the plaintiff was affirmed. *Ibid.*

11. *Willful injury of passengers by servant.* A carrier, who undertakes to transport a passenger and intrusts the execution of the contract to its servants, is bound absolutely to protect such passenger from the misconduct and violence of such servants while engaged in performing the contract. *Dwinelle v. New York Central, etc., R. Co. (N. Y.), 492.*

12. Liability generally for willful injury of passenger by servant of carrier. 500, n.

13. *Attaching car — failure to couple — falling between cars.* Plaintiff was standing on the front platform of a train, with numerous others, waiting for a car which was to be attached. The car was backed down, the usual jolt was felt, and the passengers hurried into the forward car. The cars, however, failed to couple, and, as plaintiff attempted to step to the forward car, the two receded and she fell. The coupling apparatus was of an approved kind and in good order and there was no negligence in not effecting the coupling. There was evidence that, as the cars bumped together, the conductor shouted, "All aboard." This was denied by the conductor and others. Held, a question for the jury, and that if they found that the conductor called out "all aboard" it was sufficient evidence of negligence to sustain a verdict. *Lent v. New York Central, etc., R. Co. (N. Y.), 888.*

CARRIERS — INJURIES TO PASSENGERS — *Continued.*

14. *Contributory negligence.* Whether the plaintiff was guilty of contributory negligence in not observing that the coupling was incomplete, was a question for the jury under all the circumstances, such as the fact that it was after dusk, her natural eagerness to hasten forward and get a seat, the call of the conductor and the fact that others had passed over in safety. *Ibid.*

15. *Derailment.* Plaintiff was a passenger on one of the defendant's trains composed of both freight and passenger-cars. The car in which he was riding was derailed and he was injured. Held, that the law presumed negligence from the fact of derailment, and that the plaintiff would be entitled to a verdict, unless the defendant overcame the presumption by proof that the accident was without its fault. *Arkansas Midland Railroad Company v. Canman (Ark.)*, 311.

16. Negligence cannot be inferred from the mere fact that there was a spread or bent rail at the time and place of the accident, and it is error to so instruct the jury. *Ibid.*

INSURANCE BY.

17. May insure against loss caused by negligence of their own servant. *California Ins. Co. v. Union Compress Co. (U. S.)*, 1.

OF FREIGHT.

18. *Liability for goods taken on legal process.* When property is in the hands of a carrier for transportation, and, in the course of transit, is seized upon legal process, sued out against the owner of the property, and taken out of the carrier's possession, such property is placed in the custody of the law, and is so placed by a superior power, the power of the state, and excuses the carrier from liability for not delivering the goods. *Jewett v. Olsen (Or.)*, 134.

19. *In such case the carrier should notify owner.* When goods are taken out of the possession of the carrier by legal process he should give notice forthwith to the parties interested. *Ibid.*

20. *Liability for depreciation in perishable goods in consequence of delay.* Where the transportation of a car-load of lemons was delayed for several days by the overpowering force of rioters and without fault of the railroad company, it is not liable for depreciation resulting from the perishable nature of the goods in consequence of such delay, if there was no neglect to bestow proper care upon the goods. *Gulf, C. & S. F. R. Co. v. Levi (Tex.)*, 204.

21. *Live stock — delay — injury from cold.* The defendant undertook to transport certain cattle for plaintiff from East Buffalo to New Jersey, but was delayed in starting them by a snow-storm on a distant portion of its route. While thus delayed the cold was intense, but not unusually so for that locality, and by reason of insufficient shelter some of the cattle were frozen to death and others injured. Held, that the snow-storm was not the proximate cause of the loss but the neglect to take proper care of the cattle, and that the defendant was liable. *Feinberg v. Delaware, etc., R. Co. (N. J.)*, 669.

22. The fact that the plaintiff had a man to look after the cattle and accompany them to their destination, and who rode on a pass issued by the defendant, did not exempt the company from liability, there being no contract that the pass should have that effect. *Ibid.*

23. Duty of carrier in case of unavoidable delay. 211, n.

CARRIERS — *Continued.*

DISCRIMINATION.

24. A corporation created by this state, and engaged in carrying goods for hire as a common carrier, has no franchise, privilege or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper. *State, ex rel., v. Cincinnati, etc., R. Co. (Ohio), 106.*

25. Where such corporation fixes a rate of freight per one hundred pounds, for carrying petroleum oil in iron tank cars, substantially lower than its rate for transporting it in barrels in car-load lots, it is exercising "a franchise, privilege or right in contravention of law," within the meaning of the fourth clause of section 6761, R. S. *Ibid.*

CERTIFICATES OF STOCK.

See STOCK AND STOCKHOLDERS.

CHARGES, REGULATION OF.

1. *Limiting charges of railroad companies — charter construed.* A provision in a railroad charter, that the corporation should have power to make all needful rules, regulations and by-laws touching the rates of toll and the manner of collecting the same, does not preclude future legislatures from reasonably limiting the amount of its charges. *Chicago, etc., Ry. Co. v. Minnesota (U. S.), 564.*

2. *Exemption from future general legislation.* The right of a state to impose reasonable limitations upon the charges of railroad corporations cannot be held to have been granted away, unless by express words to that effect or their equivalent. *Ibid.*

3. *The question of reasonable rates a judicial one.* An act of a state legislature which makes the decision of a railroad commission final and conclusive as to what are equal and reasonable rates to be charged by a railroad company, without any provision for a hearing before said commission or any judicial investigation, is unconstitutional and void as depriving such company of its property without due process of law and denying it the equal protection of the law. *Ibid.*

4. To deprive a railroad company of the right to charge reasonable rates for the use of its property, deprives it of the lawful use of its property, and so in substance and effect of the property itself. *Ibid.*

5. Power of legislature to regulate charges. 586, n.

6. To what services, commodities and employments the power extends 586, n.

7. Limitations of the power. 591, n.

8. Effect of rates established without judicial inquiry. 591, n.

9. How the reasonableness of established rates may be questioned or determined. 591, n.

10. How rates must be established in order to be valid. 593, n.

11. When exercise of power precluded by charter provisions. 593, n.

12. States cannot regulate charges for interstate commerce. 596, n.

13. *Telephone companies.* Regulating charges of. 409, n.

CHARTER.

See CONSTITUTIONAL LAW, 1.

COMMERCE.

See INTERSTATE COMMERCE.

CONDEMNATION.

See EMINENT DOMAIN.

CONFLICT OF LAWS.

See INTERSTATE LAW.

CONSTITUTIONAL LAW.

OBLIGATION OF CONTRACTS.

1. *Corporate charter.* An act which provides that where an execution has been issued against a corporation and no property can be found upon which to levy it, the same may be issued against any stockholder to the amount unpaid on his stock, provided such execution should not issue without an order of court and sufficient notice in writing to the person to be charged, does not violate any contract with the corporation or the state, created by a subscription made prior to the passage of the act. Such an act imposes no additional liability, but simply gives a new remedy. *Hill v. Merchants' Mutual Insurance Co.* (U. S.), 682.

2. *Modifying charter of railroad company as to route.* A railroad corporation having power by its charter, granted in 1888, to locate and construct its road where it may think proper, may, by amendment to its charter made after the company has located, but before it has constructed, its road, be confined to a particular route, on certain prescribed conditions as to a portion of the line through a given country. This results from the reserved power of the state, declared in sections 1651, 1682, Code, to withdraw the franchises, or change, modify or destroy the corporation, at the will of its creator. *Maxon, etc., R. Co. v. Stamps et al.* (Ga.), 537.

3. *Exercise of power not prevented by the existence of construction contracts for old route.* The right of the state so to amend the charter is not in any degree abridged or affected by executory contracts between the company and a construction company, and between the latter and sub-contractors, touching the construction and equipment of the road. In so far as the amendment may render the performance of these contracts impossible, the impossibility will result from act of law, and performance to that extent will be excused. All parties contracting with a corporation must take notice of the conditions on which it holds its franchises, and of its subjection to the legislative will. *Ibid.*

POLICE POWER.

4. *Compelling railroad company to construct or repair highway crossings.* The act of March 31, 1887, requiring railroad corporations to construct and keep in repair suitable crossings where railroads cross public highways, is constitutional. *State v. Chicago, etc., Railroad Co.* (Neb.), 664.

5. Under that act it is the duty of a railroad company to make and keep in repair suitable crossings, with approaches, notwithstanding the highway was laid out after the railroad was built. The public authorities are required to

CONSTITUTIONAL LAW—POLICE POWER—*Continued.*

build that part of the highway within the right of way which they would have been required to make had the railroad not been constructed. *Ibid.*

6. *Power to compel the making of private crossings.* A statute required that where a railroad was adjacent to, or laid upon a highway, open, unobstructed residence crossings substantially as are provided for highway crossings, should be provided and maintained by the railroad company, provided the same should be ordered by the railroad commissioner. In a suit to recover the penalty provided by the statute for a failure to construct a crossing to the farm residence of one F. in a case falling within the statute, and which had been ordered by the railroad commissioner, it was held: (1) That in so far as the act provided for taking the property of the railroad company for public use without compensation it was unconstitutional and void. (2) That railroad companies could not be compelled to erect and maintain residence crossings at their own expense for the use and benefit of individuals, when no statute requiring it existed at the time of the construction of the road. (3) That the facts of the case did not bring it within the power of police regulation. *People v. Detroit, etc., R. Co. (Mich.)*, 215.

7. Regulating charges of railroad companies and others for services and commodities. 585, n.

TAKING OR DAMAGING PROPERTY FOR PUBLIC USE.

8. Damages by change of street grade. See *City Council v. Maddox (Ala.)* 426, 435, n.

9. Damages by ditch in street. *Town of Longmont v. Parker (Col.)*, 91-94, n.

10. Telegraph on highway an additional burden. *Western Union Tel. Co. v. Williams (Va.)*, 258.

11. Meaning of words "damaged," and "injured," in constitution. *Town of Longmont v. Parker (Col.)*, 91-94, n.

TITLE OF ACT.

12. A substantial, not a literal, conformity of a law to its title is required by the constitution. The title indicating that a railroad is to run into and through a named town, and the body of the act providing for running it into and through the corporate limits, or within one mile of the court-house, on certain conditions, the title covers the matter of the enactment. *Macon, etc., R. Co. v. Stamps (Ga.)*, 537.

VESTED RIGHTS.

13. *Franchise and rights of gas company when not infringed by the erection of public gas-works.* A gas company incorporated for the purpose of supplying gas for lighting the streets and public and private buildings of a city, under authority from the city council erected gas-works, and laid pipes for long distances, for conducting gas through the streets for public and private consumption. The council regulated, from time to time, the price which such company might charge for gas, and from time to time made contracts with the company for lighting the streets. At the expiration of the last contract no new agreement was entered into, and the city declined to take gas any longer from the company. The company complied with all the provisions of the law of the

CONSTITUTIONAL LAW—VESTED RIGHTS—*Continued.*

state relating to gas companies, and with all the requirements of the city council in that behalf. Held, (1) That, although there was no refusal or neglect by the company to comply with the requirement of section 2480 of the Revised Statutes of Ohio as to laying pipes and lighting streets, and no neglect by the company to furnish gas to citizens and other consumers, in accordance with the prices fixed by the council, as provided in section 2482 of the Revised Statutes, the city council, under section 2486 of the Revised Statutes, was empowered to erect its own gas-works at the expense of the corporation, or to purchase gas-works already erected therein, whenever it might be deemed expedient and for the public good. (2) That the company acquired no vested rights of which it would be deprived, without due process of law, by the city's erecting its own gas-works. Spear J., dissenting. *State, ex rel., v. City of Hamilton (Ohio)*, 60.

See CHARGES, REGULATION OF; EMINENT DOMAIN, 1-12, 16, 17; INTERSTATE COMMERCE; TAXATION.

CONTRACTS.

1. *Execution of contract by corporation — burden of proof.* Where the president and secretary of a corporation execute a contract in behalf of the company, which is regular on its face, and not shown to be outside of the regular business of the corporation, it is *prima facie* evidence that it was executed with authority; and those who deny the authority take upon themselves the burden of establishing their claim. *Sherman Center Town Co. v. Swigart (Kans.)*, 158.

2. *Authority of officers to make contract.* Where the president and secretary of a corporation act openly and publicly as its agents in making contracts, and generally in managing its business, with the understanding and acquiescence of the directors that they shall so act, the corporation will not be relieved from liability upon contracts so made, upon the mere ground that the directors failed to formally confer authority on these officers by vote or resolution entered on the records of the corporation.

3. *Construction.* Divisibility of covenants and conditions in insurance contracts. 564, n.

See CONSTITUTIONAL LAW, 3; CORPORATIONS, 6; MUNICIPAL CORPORATIONS, 14, 15; ULTRA VIRES.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATIONS.

1. *Decree of dissolution, when proper.* On a bill filed by creditors against the corporation and its stockholders to reach unpaid subscriptions, a decree was entered which, among other things, dissolved the corporation. It appeared that all its property and assets were gone and that it had long before ceased to do business. Held, that the decree was proper. *Altling v. Ward (Ill.)*, 727.

2. *Lien upon stock.* See *George H. Hammond & Co. v. Hastings (U. S.)*, 698, 702, n.

CORPORATIONS—*Continued.*

3. *Power to hold real estate — escheat.* The act of April 26, 1855, provides that "no corporation * * * shall * * * hereafter acquire and hold any real estate within this commonwealth, directly in the corporate name, or by or through any trustee, or other device whatever, unless specially authorized to hold such property by the law of this commonwealth." The act also provided that all lands held in violation of the act should escheat to the state. The act of April 15, 1889, provides "that it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber or other material interests of this commonwealth by the purchase of their capital stock or bonds, or either of them, or by the guaranty of or agreement to purchase the principal or interest, or either, of such bonds." Held, that real estate belonging to a mining corporation authorized by law to hold it could not be forfeited to the state under the act of 1855, for the reason that all the stock of the mining company was held by a railroad company, and that such facts did not constitute a device on the part of the railroad company, to evade the act of 1855. *Commonwealth, ex rel., v. New York, etc., R. Co. (Penn.)*, 27, 84, n.

4. Effect of restrictions upon the power. 84, n.

5. *Effect of provision in articles of association limiting indebtedness.* A provision in a charter of a private business corporation that "the indebtedness of the company shall not exceed \$500 at one time," must be regarded as merely a by-law, and, therefore, directory only. Such a provision will not annul a contract of which the corporation has enjoyed the benefit. *Sherman Center Town Co. v. Morris (Kans.)*, 399.

6. *Ultra vires.* Estoppel of corporation to plead *ultra vires* when it has enjoyed benefit of contract. *Ibid.*, and note.

See BOOKS AND RECORDS; CONTRACTS; DIRECTORS AND OFFICERS; FOREIGN CORPORATIONS; STOCK AND STOCKHOLDERS.

CROSSINGS.

See CONSTITUTIONAL LAW, 4-6; RAILROADS, 1-7.

DAMAGES.

MEASURE OF.

1. In action for change of grade. *City Council of Montgomery v. Maddox (Ala.)*, 426.

2. In action against savings bank to recover pass-book wrongfully withheld. *Wegner v. Second Ward Savings Bank (Wis.)*, 175.

3. A statute of Missouri provides that the recovery shall be \$5,000 "whensoever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars." In this case the injury was the result of negligence in failing to give the statutory signals or in failing to have the headlight burning. Held, that in either case it was within the statute, and the court properly directed a verdict for \$5,000. *Becke v. Missouri Pac. Ry. Co. (Mo.)*, 657.

4. *In actions for causing death.* The plaintiff was the sole surviving parent of the deceased, who was a minor. Held, that the right of recovery was not limited to the wages which deceased might have earned during his minority,

DAMAGES — MEASURE OF — *Continued.*

but that she was entitled to recover any prospective pecuniary loss as well as during the minority of deceased. *Gulf, etc., R. Co. v. Compton (Tex.)*, 97.

EXEMPLARY.

5. Against railroad for laying track in street. *Power v. Manhattan Ry. Co. (N. Y.)*, 353.

6. Where a trial court has erroneously instructed the jury that they might allow exemplary damages, a verdict for the plaintiff will be set aside though the damages may be justified by the evidence as compensatory only. *Power v. Manhattan Ry. Co. (N. Y.)*, 353.

EXCESSIVE.

7. The plaintiff was a woman fifty-three years of age. She was injured in the back though not externally. She had not been able to walk since the accident and had suffered pain intermittently. The probabilities were that she would be better but would never fully recover. A verdict for \$15,000 was held excessive and a new trial was ordered unless plaintiff would remit \$5,000. *Furnish v. Missouri Pac. Ry. Co. (Mo.)*, 620.

See BANKS AND BANKING, 13; EMINENT DOMAIN, 18-24; RAILROADS, 43-53; TELEGRAPH AND TELEPHONE COMPANIES, 9-15.

DEATH BY WRONGFUL ACT.

See INTERSTATE LAW.

DEED.

1. Of right of way to railroad company, construction of. 335, n.

DEPOT.

See RAILROADS, 69-73.

DIRECTORS AND OFFICERS.

1. May not apply corporate funds to payment of individual debts. 309, n.

2. Right to inspect books and records of corporation. *Hemingway v. Hemingway (Conn.)*, 302.

3. Liability on bonds for faithful performance of duty. 450, n.

4. *Treasurer — claim for compensation.* Where a stockholder of a corporation is appointed to, and fills the position of, treasurer, without any agreement or understanding as to compensation for his services, the law will presume that the service was intended to be gratuitous, and no recovery can be had therefor, and this presumption will not be dependent upon the amount of stock held by such person. *Mather v. Eureka Mower Co. (N. Y.)*, 410.

5. *Liability of directors for wrongfully authorizing the issue of notes.* The directors of a railroad company voted, without authority, to pay their president a salary of \$25,000. Subsequently the board authorized the president to issue and negotiate the notes of the company for the purpose of paying the salary. Notes were issued and came into the hands of *bona fide* purchasers for value before maturity. In a suit by the corporation against the directors it was held that the directors were liable to the extent of the liability imposed on the corporation, and that an action could be maintained before the corporation had paid any thing on account of the notes. *Metropolitan Ry. Co. v. Kneeland et al. (N. Y.)*, 502.

DIRECTORS AND OFFICERS — *Continued.*

6. Directors who did not vote for the issue of the notes, though they voted for paying the salary, would not be liable. *Ibid.*

7. *Liability for failure to make report.* The statutes of Montana required every corporation annually to make and publish, or file for record, a certain report, and in default thereof provided that all the trustees of the company should be jointly and severally liable for all the debts of the company then existing or thereafter contracted before such report was filed. Held, that the trustees were liable under the statute for a failure to make the report required, though the corporation had become insolvent, had ceased to do business, and had transferred all its property in payment of its debts before the time for making the report. *Gaus et al. v. Switzer et al. (Mont.)*, 703.

8. Same subject discussed at length in note. 711, n.

See BUILDING AND LOAN ASSOCIATIONS; CONTRACTS; STOCK AND STOCK-HOLDERS.

ELECTRIC POLES AND WIRES.

1. For operating street railway, whether an additional burden. *Taggart v. Newport Street Ry. Co. (R. I.)*, 44.

2. For telegraph line on highway whether an additional burden. *Western Union Tel. Co. v. Williams (Va.)*, 258, 56, n. 268, n.

See STREET RAILROADS; TELEGRAPH AND TELEPHONE COMPANIES.

ELEVATED RAILROADS.

See RAILROADS, 48-49.

EMINENT DOMAIN

WHAT CONSTITUTES A TAKING.

1. Dummy railroad in street an additional burden. *East End Street Ry. Co. v. Doyle (Tenn.)*, 747.

2. Horse railroad not an additional burden on fee of street. 55, n.

3. Damages by ditch in street, whether a taking. 94, n.

4. Electric poles and wires in street, whether an additional burden. *Taggart v. Newport Street Ry. Co. (R. I.)*, 44; *Western Union Tel. Co. v. Williams (Va.)*, 258. 56, n. 268, n.

5. Flooding caused by interfering with flow of surface water, whether a taking. See *Bates v. Westborough (Mass.)*, 114. 121, n.

6. Interfering with riparian rights. *Lord v. Meadville Water Co. (Penn.)*, 747.

7. *Laying out highway adjacent to land.* The defendant city purchased land adjacent to the plaintiff's lot, and laid it out as a street. She sued for damages by reason of being deprived of privacy and rendered liable for assessments. Held, that the plaintiff's land was neither taken nor damaged within the meaning of the constitution, and a judgment for the defendant was affirmed. *Peel v. City of Atlanta (Ga.)*, 418. 415, n.

PROPERTY "DAMAGED" OR "INJURED."

8. Construction of the words generally, 94, n. 485, n.

9. *By ditch in street.* The defendant town constructed a ditch in the street in front of the plaintiff's property about fourteen feet wide and six feet deep,

EMINENT DOMAIN — PROPERTY "DAMAGED" OR "INJURED"—*Continued.*

for supplying the town with water. The fee of the street was in the public. It was held that the plaintiff was entitled to recover the amount of depreciation to his property caused by the ditch. *Town of Longmont v. Parker* (Col.), 91.

10. *Meaning of the word "damaged" in the constitution.* Under the provision of the constitution that "private property shall not be taken or damaged for public or private use without just compensation," the owner of property abutting on a street, who sustains a damage different in kind from that suffered by the general public, by reason of the use or improvement of the street, is entitled to recover to the extent of such damage.

11. Interfering with the right of ingress and egress to abutting property is a damage peculiar to the owner.

12. *By change of grade.* The city of Montgomery cut down the grade of the street in front of plaintiff's property some ten or fifteen feet. The constitution of Alabama required corporations and others invested with the power of eminent domain to make compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements. Held, that the change of grade was "a construction or enlargement" of the highway within the meaning of the constitution. *City Council of Montgomery v. Maddox* (Ala.), 426.

RIGHTS IN PROPERTY CONDEMNED.

13. Rights of railroad company in the land constituting its right of way. 536, n.

14. May only remove and appropriate so much of the soil and materials as is necessary for the construction and repair of its road. *Earlywine v. Topeka, etc., R. Co.* (Kans.), 533. 536, n.

15. Cannot authorize another railroad to construct a track thereon without compensation to owner of fee. *Fort Worth, etc., R. Co. v. Jennings* (Tex.), 121.

PUBLIC USE.

16. Whether switch tracks and lateral roads to private property are. See *Chicago, etc., R. Co. v. Porter* (Minn.), 415; *Glaessner v. Anheuser-Busch Brewing Co.* (Mo.), 420, 424, n.

17. Whether the use for which lands for the construction of a railroad track are to be taken is a public or private use does not depend on the number of persons who may have occasion to use it. If all people have a right to its use, it is a public use, though the number who require the use may be small. *Chicago, etc., R. Co. v. Porter* (Minn.), 415.

JUST COMPENSATION AND DAMAGES.

18. *Railroad through farm — entire tract.* Plaintiff's farm was in one inclosure, but the land taken for right of way for defendant's railroad was all in an eighty-acre subdivision of the same, and that subdivision alone was named in the bond for appeal from the award of the commissioners condemning the land. Held, that evidence showing the damages to the entire farm is competent. *Chicago, etc., R. Co. v. Brunson* (Kans.), 180.

19. What constitutes an entire tract for the purpose of estimating damages to remainder. 184, n.

EMINENT DOMAIN—JUST COMPENSATION AND DAMAGES—*Continued.*

20. *Damages when part of street taken for railroad purposes.* The defendant took a part of the street in front of plaintiff's lot for railroad purposes. The plaintiff owned the fee of the street. In an action to recover for the taking, it was held that the plaintiff was entitled to recover the value of the part taken, subject to the easement for a public street, together with damages to the part not taken and to the abutting lot. *Muller v. Southern Pacific Ry. Co. (Cal.)*, 40.

21. *Damages to the part not taken.* The damage to the part not taken is to be ascertained by taking the difference between its value before the defendant entered to build its road and its value after the road was completed. If there was no depreciation there was no damage. *Ibid.*

22. *Value, how estimated.* In arriving at the value of property all its capabilities are to be taken into consideration. The same considerations are to be regarded as in a sale between private parties. *Ibid.*

23. *Damage to present use.* If the abutting lot is rendered less valuable by the obstruction, because the owner is using the lot for a particular business, and the obstruction renders the lot less valuable for that business, such damage may be considered. *Ibid.*

24. *Damages to abutting property by elevated railroad in street, measure of, and how estimated.* See *Newman v. Met. El. Ry. Co. (N. Y.)*, 318; *Tallman v. Met. El. Ry. Co. (N. Y.)*, 325.

EVIDENCE.

25. *Opinions as to amount of damage.* -185, n.

26. *Opinions as to value.* 184, n.

27. *Offers to buy or sell as evidence of value.* *Muller v. Southern Pacific Ry. Co. (Cal.)*, 40, 44, n.

28. *Stating amount of damage.* When a witness for a land-owner is asked and testifies, over the objection of the company, that his farm was damaged a certain sum per acre, naming it, by the taking of a right of way through it, this is erroneous; yet if it is shown that the objection made was also to the competency of the witness to testify as an expert, who was competent, and it is also shown that objections to like questions asked other witnesses were sustained, and also that in the course of the trial like evidence had been given to proper questions without any objection of defendant, and the defendant also, in cross-examination, repeatedly asked like questions, the error is not sufficient to compel a reversal of the judgment. *Chicago, etc., R. Co. v. Brunson (Kans.)*, 180.

29. *Owner's return to the tax assessor.* Where a person is required by law to make a return of his property under oath to the tax assessor with the value of the same, such return is admissible as independent evidence of value as against the owner in a proceeding to condemn a portion of the property embraced in such return. *Birmingham Mineral R. Co. v. Smith (Ala.)*, 741.

30. *Admissions of the owner as evidence generally.* 744, n.

31. *Proof of incorporation.* On the hearing of a petition for the appointment of commissioners to determine the compensation to be paid for lands taken for railroad purposes, the petitioner should make proof of its incorporation. *Chicago, etc., R. Co. v. Porter (Minn.)*, 415.

EMINENT DOMAIN — EVIDENCE — *Continued.*

33. *Interest.* On the subject of interest in condemnation proceedings, see *Donnelly v. Brooklyn* (N. Y.), 269, 277, n.

ENFORCING AWARD BY SUIT.

33. Under the statutes applicable to the city of Brooklyn, an award of damages for property taken for public use may be reduced by an assessment of benefits upon the residue of the property from which the part was taken, and the payment of the award is postponed until the city has had an opportunity to make the assessment. In an action on an award, where the city had failed for several years to have an assessment of benefits made, it was held that the action was not founded upon negligence, but was an action on a judgment within the meaning of the statute of limitations. *Donnelly v. City of Brooklyn* (N. Y.), 269, 277, n.

DAMAGES PRESUMED TO BE INCLUDED IN AWARD.

34. Where part of a tract of land is taken for a railroad, the award is presumed to include all damages which will result from the construction and operation of the road in a proper manner. *White v. Chicago, etc., R. Co.* (Ind.), 138.

See CONSTITUTIONAL LAW; INJUNCTION; RAILROADS; TELEGRAPH AND TELEPHONE COMPANIES.

EQUITY.

See BONDS; LIMITATIONS; STOCK AND STOCKHOLDERS.

ESCHEAT.

See CORPORATIONS, 3.

ESTOPPEL.

1. To deny validity of municipal bonds. 525, n.
2. Of corporation to dispute validity of its notes. 509, n.
3. Of abutting owners to enjoin railroad in street or to claim damages therefor. *Burkham v. Ohio & Miss. R. Co.* (Ind.), 88, 90, n., 151, n.
4. Of corporation to plead *ultra vires*. *Sherman Center Town Co. v. Morris* (Kans.), 399, 402, n.

See BONDS; INSURANCE, 49; RAILROADS, 53.

EVIDENCE.

1. *Expert testimony.* A hypothetical question addressed to an expert need not embrace, in its assumptions, all the facts which the evidence tends to establish, but no facts should be assumed which the evidence does not warrant. *Gulf, etc., R. Co. v. Compton* (Tex.), 97.
2. *Expectation of life.* Where plaintiff was the sole beneficiary of the suit, held, that it was not necessary to prove her expectation of life, but that the jury might judge thereof from her age and physical condition. *Ibid.*
3. *Precautions after accident.* Evidence that ever since the accident appellant had employed a conductor on its water trains, was held to have been properly excluded. *Ibid.*, and 105, n.
4. *Burden of proof.* The derailment of a train of cars is *prima facie* evidence of negligence on the part of the railroad company, and devolves upon

EVIDENCE — *Continued.*

the company the burden of showing that such derailment was not in consequence of any negligence on the part of the company. *Furnish v. Missouri Pac. Ry. Co. (Mo.)*, 620.

5. *Res gesta* — *statement by engineer.* In a suit against a railroad company to recover for causing the death of persons on the track, a witness testified that after the train was stopped and the engineer was walking back to the bridge, he said in answer to a question: "They had whistled enough for them." Held, competent as part of the *res gesta*. *Hooker v. Chicago, etc., R. Co. (Wis.)*, 193.

See RAILROADS, 27, 34, 35.

FELLOW SERVANT.

See NEGLIGENCE, 9-19.

FIRES.

See RAILROADS, 26-35.

FORECLOSURE.

1. *Priority of claim for rental or use of rolling stock.* On August 1, 1883, a judgment creditor filed his bills, making the trustees in the several mortgages parties, and a receiver was appointed, the mortgagees neither consenting nor objecting. On December 1 of the same year the trustees in the several mortgages filed bills for the foreclosure of their mortgages and a receiver was appointed thereunder. Prior to any of these proceedings the railroad company had purchased certain rolling stock, the vendors reserving title until payment of certain annual sums called rents and with the right to retake possession upon default in payment. It was held that the claim for use or rental of this rolling stock from August 1 to December 1 was not prior to the mortgage liens, but that the prayer of the trustees for a receivership including this rolling stock, was a consent that the value of its use, or the balance of purchase-money, should be paid, and that the claim for such rental or use from December 1 was prior to the mortgage liens. *Kneeland v. American Loan & Trust Co. (U. S.)*, 596.

2. *Rental of rolling stock — how estimated.* The trustees having prayed for a receivership of the entire property and the rolling stock being in excess of that required for the operation of the road, the rental should be fixed at the fair value of the use of such property and not on the "mileage system," as the trustees, if they were not willing to pay the fair rental value of the whole, should have limited their prayer to so much as was necessary for the proper operation of the road. *Ibid.*

See APPEAL.

FOREIGN CORPORATION.

1. *Making contracts before complying with domestic statutes.* A contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business in another state will not on that account be held absolutely void, unless the statute expressly so declares; and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others. *Toledo Tie & L. Co. v. Thomas (W. Va.)*, 251.

FOREIGN CORPORATION — *Continued.*

2. *Whether such contracts may be enforced.* Our statute (sec. 30, chap. 54, Code W. Va.), which prescribes that foreign corporations shall comply with certain regulations as a prerequisite to their right to hold property or do business in this state, and fixes a penalty for their failure to do so, does not make the contracts made in this state by such corporations before compliance with said regulations absolutely void and unenforceable in the courts of this state. *Ibid.*

3. *Imposing conditions as to resort to U. S. courts.* A statute of Texas forbade foreign corporations doing business in the state until they had obtained a permit to do so from the secretary of state and had stipulated that such permit should be subject to all the provisions of the act, one of which was if any such corporation should remove any suit to the United States court, it should forfeit its permit. Held, that the statute was contrary to the constitution of the United States and void. *Texas Land & Mortgage Co., Limited, v. Worsham et al. (Tex.), 842.*

4. Such statute, if not void, would not close the courts of the state to a foreign corporation with respect to rights acquired prior to the taking effect of the act. *Ibid.*

5. *Enforcing liability of stockholders in foreign corporation.* A statute, under which a Michigan corporation was organized, made the stockholders liable for all labor performed for the corporation, the liability to be enforced by an action of *assumpsit*. It is also required suit to be brought against any and all the stockholders and the corporation jointly, and no execution was to issue until the property of the corporation was exhausted. Another section required actions against corporations to be commenced in the county where their works were situated or business office located. Held, that the remedy provided by the statute was exclusive and a bill in equity would not lie against part of the stockholders alone. *May v. Black et al. (Wis.), 678.*

6. No action would lie in Wisconsin because jurisdiction could not be had of the corporation and because the statute prescribed a particular place for commencing the suit. *Ibid.*

7. Same subject treated in note, p. 678.

See INSURANCE, 43-45; INTER-STATE COMMERCE, 4.

GAS.

See CONSTITUTIONAL LAW, 13.

GRADE, CHANGE OF.

See EMINENT DOMAIN, 12.

HORSE RAILROADS.

See STREET RAILROADS.

INJUNCTION.

1. *Right of tax payers to enjoin illegal contract.* An injunction will be granted at the suit of a tax payer to restrain the officers of a municipal corporation from making a contract which they have no authority to make and which will increase the burden of taxation. *Mayor, etc., of Baltimore et al. v. Keyser et al. (Md.), 452.*

INJUNCTION — *Continued.*

2. To prevent the construction or operation of a railroad in a street. *Glaessner v. Anheuser-Busch Brewing Ass. (Mo.)*, 420, 90, n., 151, n.

3. *To prevent entry on private property before condemnation.* The plaintiff, a coal company, owned the coal beneath a tract of land, with the right to remove all the coal without regard to the effect of such removal upon the surface. The defendant gas company sought to lay its pipes across the surface of the tract without compensation to the coal company. Held, that the effect of the entry by the defendant under the power of eminent domain was to take for the public use the right of subjacent support and that the plaintiff was entitled to an injunction to restrain such entry until compensation was made, unless the defendant would agree to be bound by the release of the right of support which the owner of the surface had made, or would give security for the payment of damages as required by law. *Penn Gas Coal Co. v. Versailles Fuel Gas Co. (Penn.)*, 610.

4. To prevent use of a railroad right of way for the tracks of a second company without compensation to the owner of the fee. *Forth Worth, etc., R. Co. v. Jennings (Tex.)*, 121.

INSTRUCTIONS.

1. It is error to instruct a jury that they must be *satisfied* upon a given point. They should give their verdict upon the preponderance of the evidence alone, or against the party who has the burden of proof where the evidence is evenly balanced. *Arkansas Midland Ry. Co. v. Canman (Ark.)*, 811.

2. In suit for ejecting passenger, see *Chicago City Ry. Co. v. Pelletier (Ill.)*, 616.

3. In suit for injuries caused by derailment, see *Furnish v. Missouri Pac. Ry. Co. (Mo.)*, 620.

4. On the trial of an action for setting fire to the plaintiff's grain and crops, the court instructed the jury as follows: "If the defendant owned the road on which the locomotive ran, and the locomotive did set fire as alleged, the presumption is that it was the negligence of the owner of the road, and this presumption continues until the contrary appears from the evidence. If an expert testifies that he operated the locomotive at that time with due care and thought, and it was so constructed that it would not set fire as thus operated, and the jury believe from the evidence that it actually did set fire at that time, the jury are to consider which of these proofs they will believe, the former or the latter." Held, that the instruction was confused and ambiguous and might reasonably be construed to mean that if the fire was set by the engine the plaintiff might recover, which is not the law. *Columbia, etc., R. Co. v. Farrington (Wash.)*, 165, n.

5. In a case where a boy of twelve, who was walking on the track under such circumstances, was injured by a long freight train being backed along the track, the following instruction was held to be correct: "Parties managing moving trains must provide a careful lookout in the direction that the train is moving in places where people, and especially children, are liable to be upon the track. Where a train is being drawn by a locomotive, there is always a lookout, and means of giving notice and warning to travelers on the track, or in places of danger, of the approach of the train. When a train is

INSTRUCTIONS—*Continued.*

being backed, then the train is in such a condition, or in such a position, that other means of warning are required by the law, and, as I have given out in the rule, there must be some lookout provided, so that in case parties, especially in localities where women and children are likely to be, where those parties are, they can be warned of approaching danger if they don't see it." *Whalen v. Chicago & N. W. Ry. Co. (Wis.)*, 199, n.

See MUNICIPAL CORPORATIONS, 23, 23; PLEADING AND PRACTICE, 8, 9; RAILROADS, 54, 55.

INSURANCE

AGENTS.

1. *Whether agent of company or of insured.* The agent of an insurance company, who is authorized to procure applications for insurance and to forward them to the company for acceptance, is the agent of the insurer, and not of the insured, in all that he does in preparing the applications, or as to any representations as to the character and effect of the statements so made. 469, n.

2. Persons engaged in the insurance business, who, though not agents of the defendant company, are in the habit of submitting to it applications for its action, and who receive a part of the premium on such as are accepted by it, are the agents of the defendant as to the applications so accepted, so as to charge it with their knowledge regarding the insured premises. *Indiana Ins. Co. v. Hartwell (Ind.)*, 470, n.

3. G. applied to B., who was an insurance broker, for insurance in a certain amount. B. made application to L. & M., who were agents of the defendant company, for the insurance, obtained the policy and delivered it to G. B. was not the agent of the defendant but was in the habit of submitting applications as in this case, and when accepted he received fifteen per cent of the premium. Held, that he was the agent of G. in obtaining the insurance, but that his agency ceased when the policy was delivered, and that notice to him of its cancellation was not notice to the holder of the policy. *East Texas Fire Ins. Co. v. Blum (Tex.)*, 470, n.

4. *Clerks of agents.* Agents may employ clerks whose acts will have same effect as if done by themselves. 470, n.

APPLICATION.

5. In an application for insurance, where correct answers are given to a general agent of the company respecting incumbrances on the property of the applicant, and such agent fails to mention the incumbrances in the written application, but procures the signature of the applicant, accepts the premium, and closes the contract, the company will not be relieved from liability on account of misrepresentations in the application, although it was stipulated therein that it should be considered a part of the policy and a warranty by the insured of the truth of the statements which it contained. *German Ins. Co. v. Gray (Kans.)*, 459.

6. To the same effect, see cases cited, 471, n

ARBITRATION.

7. A policy provided that, in case the parties could not agree, the amount of the loss or damage should be determined by arbitrators, whose award should

INSURANCE — ARBITRATION — *Continued.*

be binding and conclusive as to the amount of such loss or damage, and that the loss should not be payable and no suit brought therefor until such award was obtained. The provision was held to be reasonable and valid and binding upon the parties. *Chippewa Lumber Co. v. Phoenix Ins. Co. (Mich.)*, 471, n.

8. As to what will constitute a "difference" between the parties within the meaning of a provision for arbitration and as to its construction generally, see *Pioneer Manf. Co. v. Phoenix Ass. Co. (Va.)*, 472, n.

9. According to the terms of certain policies, if the insured and the agent of the insurer present to adjust a loss, should be unable to agree, the former was to deposit with the agent \$10 to pay the expenses of an appraisal of the loss, and the agent was thereupon to appoint three appraisers, who should immediately repair to the field where the loss occurred, and appraise the loss or damage. Held, that an appraisal without notice to the insured of the appointment of appraisers, and of the time when they were to make the examination, was void. *Schreiber v. German-American Hail Ins. Co. (Minn.)*, 472, n.

* 10. For condition held too indefinite to be enforced, see 471, n.

11. *Waiver of provision for arbitration.* The policy provided that no suit should be brought on the policy until after an award had been made fixing the amount of the claim. The plaintiffs submitted proofs of loss, to which the defendant replied denying all liability. Held, that the action of the company was a waiver of the provision, and that an offer of the plaintiffs to arbitrate would have been an idle act. *Farnum v. Phoenix Ins. Co. (Cal.)*, 72, 471, n.

ASSIGNMENT OF POLICY.

12. The consent of the company to an assignment of the policy given after the assignment is made, has the same effect as though given before. *Dwelling-House Ins. Co. v. Gould (Penn.)*, 472, n.

13. After a policy was issued the assured mortgaged the property, and the agent of the company wrote in the policy, "loss, if any, payable to N. W., mortgagee." Subsequently, the assured sold the property and went to the same agent, informed him of the sale and requested him to fix the policy so that the mortgagee would be secure; the agent said it was all right as it was. It was held that the company was estopped from avoiding the policy. *Phoenix Ass. Co. v. Wachter (Penn.)*, 472, n.

BY-LAWS.

14. *Mutual companies — duty of members to ascertain by-laws.* Those who become members of mutual companies are bound to take notice of the by-laws of the company, and they cannot assail them on the ground that they were not legally adopted. *Pfister v. Gerwig (Ind.)*, 165.

CANCELLATION AND FORFEITURE.

15. A policy cannot be canceled without notice to the assured. *Scott v. Sun Fire Office (Penn.)*, 472, n.

16. Forfeitures are not favored, and courts will not declare a policy of insurance forfeited unless compelled to do so. *Springfield Fire & Marine Ins. Co. v. McLimans (Neb.)*, 472, n.

17. If the company, with knowledge of a cause of forfeiture, insists upon

INSURANCE — CANCELLATION AND FORFEITURE — *Continued.*

any of the provisions of the policy, it thereby treats the contract as in force and waives the forfeiture. *McFarland v. Kittanning Ins. Co. (Penn.)*, 472, n.

18. A policy provided as follows: "This insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with the expenses of writing the risk." Held, that the "expenses of writing the risk," included the commission paid to the agent, and not merely the cost of writing the policy. *State Ins. Co. v. Homer (Col.)*, 472, n.

19. Acting under instructions from the general agents for the state, the local agent mailed a notice to the plaintiffs on the last of June, to the effect that the premium must be paid by July 1, or the policy would be canceled. This letter was not received by the plaintiffs. Afterward the policy was canceled on the books of the company. Held, that the policy could only be canceled by personal notice to the plaintiffs, and that what had been done toward canceling the policy was ineffectual. *Farnum v. Phoenix Ins. Co. (Cal.)*, 72.

CONDITIONS, CONSTRUCTION AND EFFECT.

20. *As to apportionment of loss.* A policy provided that the assured should not be entitled to recover of the company "any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, * * * without reference to the solvency or liability of other insurers." The agent of the defendant company represented to the plaintiff that the policy in suit was canceled, which was not true. Thereupon he obtained other insurance, representing that his property was not insured. The latter insurance was void from the beginning, because this representation was not true in fact. Held, that such other insurance was not to be taken into consideration in estimating the defendant's liability; that the words of the condition did not refer to supposed contracts of insurance which never became valid, but only to such as had become avoided by breach of condition. *Parks v. Hartford Fire Ins. Co. (Mo.)*, 472, n. See, generally, 471, n.

21. *As to contractor's risk.* Where a builder contracts with the owner of lots to furnish the material, and erect thereon a house, and said builder, desiring a contractor's insurance on a building, goes with the owner to an insurance agency, and makes application for such insurance, and the agents issue a policy in the name of the owner, and insert therein a clause, "contractor's insurance for thirty days," and the intention is to indemnify the contractor against loss by fire for thirty days, and at the expiration of that time indemnify the owner against loss by fire on said building for three years, held, that such a policy may be enforced for the benefit of the builder. Held, also, that, to explain and give effect to such a policy, oral evidence may be resorted to. *Germania Fire Ins. Co. v. Thompson (Kans.)*, 473, n.

22. *As to keeping and using kerosene, etc.* A policy provided that coal, kerosene or carbon oil should not be kept or used upon the premises without a written permission indorsed on the policy "excepting the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void." Attached to the policy was a printed slip signed by the defendant company as follows: "Privileged to use kerosene oil for lights, lamps to be trimmed and filled by

INSURANCE — CONDITIONS, CONSTRUCTION AND EFFECT — *Continued.*

daylight only." There was also indorsed: "Privileged to keep not exceeding five barrels of oil on said premises." The insured property was destroyed by a fire caused by drawing kerosene in the oil-room of the premises near a lighted lantern at about dusk. The oil was drawn by persons acting under the authority of a tenant of the assured and not for the purpose of being used on the premises. The trial court directed a verdict for the defendant which was affirmed. *Gunther v. Liverpool, etc., Ins. Co. (U. S.)*, 473, n.

23. *As to repairs.* Under a policy which does not forbid repairs *per se*, but imposes the condition on the insured to obtain the written consent of the company before doing any act which may increase the risk insured against, courts will not conclude that repairs, though very extensive, and bordering on reconstruction, operate an increase of risk, but will weigh the degree of care used by the insured while making such alterations, and all circumstances connected with the operation, and decide each case on a particular showing therein made. An addition or extension to an insured building does not of itself operate an increase of the risk. The improvements made to the building in connection with the extension may decrease the risk. *Meyer v. Queen Ins. Co. (La.)*, 473, n.

24. *As to other insurance.* A policy contained these words: "Total concurrent insurance, \$4,000." There was also a provision that if the assured should obtain any additional insurance without the consent of the company indorsed, the policy should be void. The policy in suit was for \$1,000, and when it was issued the assured already had \$3,000 upon the property. Afterward assured obtained another policy for \$1,000. It was held that the words "concurrent insurance" meant insurance in force at the same time upon the same property for the benefit of the same parties or interest; that the policy sued on with the \$3,000 previously in force made up the total permitted without consent of the company, and that the additional \$1,000 was a violation of the condition and avoided the policy. *East Texas Fire Insurance Co. v. Blum (Tex.)*, 476, n.

CONDITIONS AS TO TITLE AND POSSESSION.

25. *Condition as to title.* The defendant for a gross sum insured the plaintiff in the sum of \$1,000, distributed in specific amounts upon six different articles or classes of personal property, all contained in the same building and subject to the same risk. One of the articles was a soda fountain insured for \$350. The policy provided that if the assured was not the sole, absolute and unconditional owner of the property, the policy should be void. The assured had purchased the soda fountain and given his notes for the price, and the notes provided that the title to the fountain should remain in the seller until the notes were all paid. The insured was ignorant of the effect of the notes on his title. Held, that the condition was violated and the policy void as to the fountain. *Geiss v. Franklin Ins. Co. (Ind.)*, 561.

26. *Whether divisible.* It was held further that as the consideration paid was a gross sum and all the property insured was subject to the same risk, the contract was entire and, being void as to part, was void as to all the property insured. *Ibid.*

27. *Condition against change of title or possession.* Plaintiff insured certain hotel property in the defendant company. The policy provided that if there

INSURANCE—CONDITIONS AS TO TITLE AND POSSESSION—*Continued.*

should be any change in the title or possession of the property there should be no liability under the policy. Subsequently the plaintiff leased the property to S. for five years with an agreement that S. might purchase the property at any time within the five years at a specified price, and binding him to purchase it at that price on or before the expiration of the five years. S. took possession of the property. Held, that there was such a change in the title of the property as avoided the policy. *Smith et al. v. Phoenix Ins. Co. (Cal.)*, 223.

28. *Effect of notice to the company.* The fact that the company knew that S. was in possession of the property under the lease, though it did not know of the agreement to purchase, would not prevent it from insisting upon the condition or constitute a waiver of it. *Ibid.*

29. *Condition as to contract to sell.* The policy contained a provision that it should be void if the assured failed to notify the company that a contract had been signed to sell the property insured. Held, that this referred to a contract to sell to a stranger, and not to a contract to sell between the parties insured, the effect of which is merely to change their respective interests. *Allemania Fire Ins. Co. v. Peck (Ill.)*, 438.

30. *Change of title by reason of death of assured.* Action on a policy in the German Mutual Insurance Company by the administrator and widow of deceased. The policy covered both personal and real property. The property was destroyed after the death of assured and after the administrator had obtained an order to sell the property for the payment of debts. A by-law of the company provided that a transfer of the property should render the policy void. Held, that a transfer by operation of law upon the death of the assured did not avoid the policy. *Pfister v. Gerwig (Ind.)*, 165, 169, n.

31. *Condition held not to apply.* The defendant company insured the plaintiff upon its building, and upon its tools and machinery contained therein. It had no interest in the building except as lessee. The policy contained a provision that "if the assured is not the sole and unconditional owner of the property, or if the building stood on ground not owned in fee simple by the assured, or if the interest of the assured is not truly stated in the policy," then the policy should be void. The policy was issued without any written application or any representations by the assured, either written or oral. It was held that it would be presumed that the agent of the company issued the policy upon his own knowledge of the condition and title of the property, and that the policy was intended to cover such interest as the assured had therein, and that the above condition had no application to the case. *Philadelphia Tool Co. v. British-American Ass. Co. (Penn.)*, 474, n.

CONDITION AGAINST INCUMBRANCES.

32. A provision that if the property shall become incumbered by mortgage is violated by a mortgage given to secure one as surety for the insured, though no right of action has accrued thereunder. It was an increase of the risk by diminishing the assured's interest in the property. *Lee v. Agricultural Ins. Co. (Iowa)*, 228, n.

33. The by-laws of a mutual company provided that any transfer or incumbrance of the property, whether by mortgage, judgment lien or otherwise,

INSURANCE — CONDITION AGAINST INCUMBRANCES — *Continued.*

should cancel the policy unless ratified by the board of directors. A mortgage of the real estate insured was proved. Held, fatal to the right to recover. *Pfister v. Gerwig* (Ind.), 165.

34. *Waiver of, by agent.* A provision in an insurance policy respecting incumbrances on the property insured may be waived by the insurance company or its general agent; and this although the policy contains a printed stipulation that no agent of the company or any person other than the president or secretary shall have authority to waive any of the terms or conditions of the policy, and all agreements by the president or secretary must be signed by either of them. *German Ins. Co. v. Gray* (Kans.), 459.

35. In answer to a question in the application for insurance, "Is there a \$1,000 incumbrance on the property?" the assured answered that there was over \$2,000 incumbrance on it. There was in fact over \$5,000 incumbrance on the property. Held, a misrepresentation which avoided the policy. *Smith v. Agricultural Ins. Co.* (N. Y.), 473, n.

36. A change in the items of incumbrance without changing the aggregate amount will not avoid the policy. *Dwelling-House Ins. Co. v. Gould* (Penn.), 473, n.

CONSTRUCTION OF POLICY GENERALLY.

37. A contract of insurance, in case of ambiguity is to be taken against the company and in favor of the assured. *Philadelphia Tool Co. v. British Am. Ass. Co.* (Penn.), 474, n.

38. Though a policy provides that in certain contingencies it shall be null and void, yet it is not absolutely void upon the happening of such contingency, but only voidable at the election of the insurer. *Schreiber v. German-American Hail Ins. Co.* (Minn.), 474, n.

39. *Divisibility of covenants.* Where a policy is upon a building and its contents and it is avoided as to the building by a breach of condition, it is avoided as to the contents also. *Western Ass. Co. v. Stoddard* (Ala.), 474, n.

40. Meaning of words "property held in trust." 26, n.

41. On divisibility of covenants and conditions generally, see 564, n.

42. *Meaning of words "direct loss or damage by fire."* The words "direct loss or damage by fire" in the policy did not preclude a recovery in the interest of the railroad companies who were liable only for negligence, because these words refer only to the distinction between the directness and remoteness of fire as the destroying agency. *California Ins. Co. v. Union Compress Co.* (U. S.), 1.

FOREIGN INSURANCE COMPANIES.

43. *Statutory provisions applicable to.* A statute of Wisconsin requires that a true copy of any application or representation of the assured, which by the terms of the policy is made a part thereof, shall be attached to or indorsed upon the policy, or the company shall be precluded from pleading or proving the same or the falsity thereof in any action upon the policy. It was held that the statute applied to a contract of insurance made without the state by a foreign insurance company upon personal property within the state. *Stanhilber v. Mut. Mill Ins. Co.* (Wis.), 474, n.

44. A statute of Pennsylvania prohibited foreign insurance companies from

INSURANCE—FOREIGN INSURANCE COMPANIES—*Continued.*

doing business in that state until they had complied with certain conditions, and imposed a penalty for its violation. Held, that the statute did not render a policy void which was issued by an Iowa company upon property in the former state, without complying with the law, there being no prohibition against persons receiving policies from a foreign company before it was qualified to do business, and the whole purpose of the statute being for the protection of persons obtaining insurance. *Pennypacker v. Capital Ins. Co. (Iowa)*, 475, n.

45. In an indictment under section 292, chapter 34, General Statutes 1878 (Minn.), as amended by chapter 54, Laws 1879, for acting as the agent of an insurance company not of this state, without the proper certificate of authority from the insurance commissioner, it is immaterial that the company had or had not complied with the statute. *State v. Johnson (Minn.)*, 474, n.

INSURABLE INTEREST.

46. The defendant issued to the plaintiff, the Compress Company, a policy of insurance, "against all direct loss or damage by fire," on cotton in bales, their own, or held in trust or on commission," while contained in or upon certain specified premises. The policy was not to cover any cotton which should be covered at the time of the loss in whole or in part by a marine policy. The policy was to be void if any changes took place in the possession of the property insured. The plaintiff was engaged in the business of compressing cotton and issued receipts to those depositing cotton for that purpose. Said receipts were surrendered by their owners to certain railroad companies, who issued bills of lading therefor in the names of the persons to whom the same was to be consigned, agreeing not to ship the same until compressed by the plaintiff. There was an agreement between the plaintiff and the railroad companies that the former should keep the cotton insured for their benefit after notice of the bills of lading, until delivered to them. The suit was to recover for cotton destroyed by fire while in the possession of the plaintiff on the premises specified in the policy and after bills of lading had been issued therefor by the railroad companies. The fire was claimed to have been caused by the negligence of the railroad companies. There was evidence tending to show that the whole course of business was known to the agent of the insurance company when the policy was issued. The owners of most of the cotton destroyed had made claims against the railroad companies. Some of these claims were in suit and some had been paid after judgment. It was held, first, that the railroad companies had an insurable interest in the cotton and that it was lawful for the plaintiff to insure the cotton in its own name for the benefit of such companies. *California Ins. Co. v. Union Compress Co. (U. S.)*, 1.

47. That the words "held by them in trust" were appropriate and effectual to cover the property in question, the plaintiff being in effect a trustee for the railroad companies who held its receipts, and that the words of the policy could not be limited to property held in trust for the absolute owner. *Ibid.*

48. *Parol evidence, when admissible.* It was proper to show by parol that the course of business was known by and stated to the agent of defendant and that the policy was intended to cover the interests of the railroad companies. *Ibid.*

49. *Estoppel.* The defendant having issued the policy with notice that it

INSURANCE — INSURABLE INTEREST — *Continued.*

was intended to cover the interest of the railroad companies, it was estopped from asserting that it was intended to protect only the legal owners of the cotton. *Ibid.*

50. *Policy, construed.* The fact that the owners of the cotton held marine insurance on a portion thereof, did not prevent a recovery, as the policy intended marine insurance upon the same interest and for the benefit of the same persons. *Ibid.*

51. *Defendant's liability not contingent upon payment by railroad companies.* The defendant's liability was not contingent upon the railroad companies being compelled to pay nor limited to the amount paid by them, but the defendant is liable at once and for the full value of the property, provided it was destroyed by fire under circumstances which rendered the railroad companies liable. *Ibid.*

LIMITATION CLAUSE IN POLICY.

52. *Construction of.* A policy provided that no suit should be sustained thereon unless commenced within twelve months after the occurrence of the fire. By another provision proofs of loss were to be made, and the loss was made payable "sixty days after the full completion by the assured of all the requirements herein contained." Held, that the twelve months did not begin to run until the expiration of the sixty days specified. *Case v. Insurance Company (Cal.)*, 278, 470, n.

53. *Waiver of.* An insurance policy provided that no suit should be brought thereon unless within six months after the fire. Held, that if the company deterred the plaintiffs from bringing suit within the time limited, by engaging in negotiations for a settlement and by holding out reasonable hopes of an adjustment, then the company would be estopped from setting up the limitation. To create such estoppel it is not necessary that the delay should be at the request of the company. *Allemania Fire Ins. Co. v. Peck et al. (Ill.)*, 438, 445, n.

54. *Must have separate consideration.* To sustain a proviso in a contract that an action thereon must be brought within a time much less than that provided by the statute of limitations — as six months — there must be a consideration, unless it was within the contemplation of the parties when the contract was entered into; and this rule applies to a policy of insurance. *Bower v. McMurty (Neb.)*, 393.

55. Where a policy of fire insurance provides that action thereon must be brought within a specified time after the loss occurs, the limitation runs from the date of the fire, although, under other provisions of the policy, the cause of action does not accrue until some time after the fire. *Travelers' Ins. Co. v. California Ins. Co. (N. D.)*, 470, n.

MISTAKE.

56. *Reformation of policy for.* Where there is a mutual mistake in drawing up a policy, it may be corrected in a court of equity. *Deitz v. Providence Washington Ins. Co. (W. Va.)*, 470, n., 475, n.

NOTICE AND PROOF OF LOSS.

57. Where a policy provides that notice of loss shall be forthwith given to the secretary of the company, it is a sufficient compliance to send a notice direct to the company. *Lewis v. Burlington Ins. Co. (Iowa)*, 475, n.

INSURANCE — NOTICE AND PROOF OF LOSS — *Continued.*

58. Notice of loss served on the general agent of the company is the same as service on the company. *Insurance Co. v. McLimans* (Neb.), 475, n.

59. Where a policy requires notice of loss to be given "forthwith," it means in a reasonable time. *Pennypacker v. Capital Ins. Co.* (Iowa), 475, n.

60. Where a policy of fire insurance provides that "any fraud or attempt at fraud, or any false swearing, on the part of the assured," shall cause a forfeiture of all claims under the policy, a willfully false statement in the proof of loss, after the fire, of some pretended losses, will completely forfeit the entire policy, even though the actual losses, truly stated, exceeded the entire amount of the policy. *Dolloff v. Phoenix Ins. Co.* (Me.), 475, n.

61. Where the evidence shows that proofs of loss were mailed to the company in due time, and the company's officers and clerks who received its mail testified that no such proofs were received, a verdict for the plaintiff will not be disturbed. *Pennypacker v. Capital Ins. Co.* (Iowa), 475, n.

62. If the company denies its liability on independent grounds it thereby waives the condition requiring proofs of loss. *Deitz v. Providence Washington Ins. Co.* (W. Va.), 475, n.

63. Where the assured furnishes proofs of loss which he in good faith intends as a compliance with the policy, it is the duty of the company to at once notify him of its objections thereto, or it will be estopped from insisting that they are not in compliance with the policy. *Dwelling-House Ins. Co. v. Gould* (Penn.), 476, n.

64. The limitation as to the time of presenting proofs of loss may be waived by the conduct of the company in its efforts to effect a compromise. *Guinn v. Phoenix Ins. Co.* (Iowa), 476, n.

65. *Estoppel to object thereto.* Where proofs of loss are taken by a duly-authorized adjuster of the company, who expresses satisfaction with the same, and states that he will forward them to the office of the company, and that the loss will soon be paid, the insured has a right to assume, until notified to the contrary, that no other or different proofs will be required; and the failure of the company to object to them within a reasonable time precludes it from thereafter objecting that they are insufficient. *German Ins. Co. v. Gray* (Kans.), 459.

PREMIUM.

66. *Whether suit will lie for.* A fire insurance policy at a gross premium for the term of five years, the insured giving two notes for the premium, contained a clause that, in case of default to pay any note, the insurance should be suspended, and the premium considered as earned, but that, on subsequent full payment, the policy should be revived and in force as to losses happening thereafter. Held, that upon a default to pay a premium note, the insurer can recover the amount of it. *Minnesota Farmers' Mut. Ins. Ass'n v. Olson* (Minn.), 476, n.

67. *Waiving pre-payment of.* Defendant, through its local agent, who was authorized to make contracts of insurance and countersign policies, insured the plaintiff on certain property for five years from May 1, 1887. The agent had authority to give a credit of sixty days for the payment of the premium but he gave the plaintiffs until October 1. On September 5 the property in-

INSURANCE — PREMIUM — *Continued.*

sured was destroyed by fire and on September 80 the plaintiffs tendered the premium, which was refused. The policy contained a provision that the company would not be liable until the premium was actually paid, also that nothing should amount to a waiver of any condition therein except "a distinct, specific agreement, clearly expressed and indorsed on the policy." Held, that the delivery of the policy upon an agreement giving credit for the premium was a waiver of the condition as to pre-payment, and the policy was binding upon the company from its delivery. *Farnum et al. v. Phenix Ins. Co. (Col.)*, 72.

SUIT ON POLICY. EVIDENCE, VENUE, PLEADING, PARTIES, ETC.

68. A contract of fire insurance made in Iowa, the statutes of which state provide in what counties an action may be brought on the policy, does not limit the right to bring an action for loss of the property to that state. The action is transitory in its nature, and may be brought wherever service may be had on the company. *Insurance Co. v. McLimans (Neb.)*, 470, n.

69. A mortgagee, to whom a loss is made payable, may sue alone on a policy when his claim exceeds the amount of the loss. *Travelers' Ins. Co. v. California Ins. Co. (N. D.)*, 471, n.

70. Where several policies are taken out in different companies, without any relation to each other, on the same property, they are independent contracts, and the policy in one company cannot be received in evidence to explain or vary what is contained in the other. *Westinghouse Electric Co. v. Western Ass. Co. (La.)*, 471, n.

71. Where by the policy the recovery cannot exceed the cost of reproducing the property destroyed, evidence as to the market or cash value of the property is improper. *Chippewa Lumber Co. v. Phoenix Ins. Co. (Mich.)*, 471, n.

"VACANT AND UNOCCUPIED."

72. A mere temporary absence of the occupant will not avoid the policy. *Springfield Fire & Marine Ins. Co. v. McLimans (Neb.)*, 474, n.

73. Where the premises are occupied in the same manner when burned as when insured and the manner of occupancy was known to the agent who placed the insurance, no forfeiture can be insisted upon. *Fritz v. Home Ins. Co. (Mich.)*, 474, n.

74. A representation of the agent as to the effect of a rule of the company allowing a vacancy of thirty days upon a condition of the policy as to vacancy, held not a waiver of the condition or binding on the company, as it was a mere opinion touching the company's legal liability. *Rogers v. Phoenix Ins. Co. (Ind.)*, 474, n.

WAIVER.

75. *Effect of restrictions in policy as to waiver.* The provision in the policy requiring a waiver to be indorsed on the policy can have no operation until the policy is delivered, and, consequently, does not affect a waiver made previous to the issuing of the policy. *Farnum v. Phoenix Ins. Co. (Cal.)*, 72.

76. An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, that it cannot, by its agents, make an oral contract, or an oral waiver not forbidden by the statute of frauds. *Ibid.*

INSURANCE — WAIVER — *Continued.*

77. *Waiver by agent.* A general agent of an insurance company can modify the insurance contract, or waive a condition of a written policy by parol. *German Ins. Co. v. Gray* (Kans.), 459.

78. The agent having authority to countersign and deliver policies of insurance, and thereby complete the contract, and, also, to give a credit for the payment of the premium, is clothed with apparent authority to represent the company, and can bind the company by waiving pre-payment of the premium. *Farnum v. Phoenix Ins. Co.* (Cal.), 72.

79. An agent whose general duties were to solicit insurance, fill in policies already signed by the general officers of the company, countersign and deliver the same, and collect and remit the premium, waived immediate payment by the plaintiff and delivered to him the policy sued on. The policy contained a provision that no insurance should be considered binding until actual payment of the premium. Also, that no part of the contract could be waived except in writing signed by the secretary of the company. It was held that the policy was notice to the plaintiff that the agent had no power to make the waiver, and that, by accepting the policy, he was estopped from setting up powers in the agent in opposition to the express limitations contained in the policy. *Wilkins v. State Ins. Co.* (Minn.), 84, n.

80. Restrictions in a policy upon the power of an agent to waive its conditions, can have no application to a waiver made before the policy is issued. 85, n.

81. A provision in a policy that the insured shall keep the property insured to the amount of four-fifths of its value or be a co-insurer as to the deficit, and in case of loss, bear his proportion of such loss, may be waived by parol by the agent of the company effecting the insurance. *Stanbilber v. Mutual Mill, Ins. Co.* (Wis.), 470, n.

See MUTUAL BENEFIT SOCIETIES.

INTEREST.

See BANKS AND BANKING, 13.

INTERSTATE COMMERCE.

1. *License tax upon railroad agent.* An ordinance of the city and county of San Francisco imposing a license tax upon the agent of a railroad company, who is engaged in soliciting passenger traffic over a railroad operated between Chicago and New York, is unconstitutional and void because such agent is engaged in the business of interstate commerce. *McCall v. People of the State of California* (U. S.), 682.

2. The fact that the road in question is wholly without the state of California is immaterial. A state can no more tax interstate commerce wholly without its limits than it can a commerce passing into or through it. *Ibid.*

3. *What is interstate commerce.* Soliciting passengers in San Francisco to be transported from Chicago to New York is directly and not remotely or incidentally connected with interstate commerce. *Ibid.*

4. *Taxation of interstate commerce.* A statute of Pennsylvania provided that no foreign corporation, which did not invest or use its capital within the state, should have an office within the state, unless it should first pay an annual li-

INTERSTATE COMMERCE—*Continued.*

cense fee of one-fourth of a mill on each dollar of its capital stock. The N. & W. R. Co., was a corporation existing under the laws of Virginia and West Virginia, whose line of road by means of certain traffic arrangements with other railroads had become a link in a through line over which passengers and freight were transported into and out of the state. During certain years it maintained an office in the city of Philadelphia, and this was a proceeding to enforce the above-mentioned tax. Held, that the railroad company was engaged in interstate commerce, and that the tax in question was a tax upon one of the means or instruments by which it carried on its business of interstate commerce and was, therefore, unconstitutional and void. *Norfolk & Western R. Co. v. Pennsylvania (U. S.)*, 639.

5. The rolling stock of a non-resident railroad corporation which has its *situs* in North Carolina, and is constantly employed there, is subject to taxation in that state. *Bain, State Treasurer, v. Richmond & Danville R. Co. (N. C.)*, 186.

6. But rolling stock belonging to such company, employed in interstate commerce, is not taxable in the state, though it may constantly have a large amount in value of such stock in the state. *Ibid.*

7. *Regulation by state.* A statute of Missouri required persons, owning or operating railroads in that state, to furnish double-decked cars for the transportation of sheep, and, in case they failed or refused so to do, made it unlawful for them to charge or receive more than half the regular rates for transporting stock. Held, that the statute will not be construed to have any extra-territorial effect, and that if, as properly construed, it applied to interstate commerce, it would be void. *Stanley v. Wabash, etc., Ry. Co. (Mo.)*, 654.

8. The plaintiff, having been obliged to ship sheep in ordinary cars from a point in Missouri to a point in Illinois, recovered a judgment under the statute for excess of freight charged and paid. The judgment was reversed. *Ibid.*

9. *Whether states may prevent discrimination as to.* Where a railway company incorporated under the laws of this state misuses a franchise, privilege or right conferred upon it, or claims the right to exercise, or has exercised, "a franchise, privilege or right in contravention of law," this court has jurisdiction to inquire into and correct the mischief, though the corporation may be engaged in interstate commerce, and the misuser or usurpation to be corrected relate to and concern that traffic. *State, ex rel. Kohler, Attorney-General, v. Cincinnati, W. & B. Ry. Co. (Ohio)*, 106.

POWER OF THE STATES.

10. *Their power to legislate concerning matters affecting interstate commerce considered generally and with reference to the following subjects.* 645, n.

11. Improvement of navigation. Wharfs, pilots, dams, bridges, etc. 645, n.

12. Quarantine and inspection laws. 646, n.

13. The examination and licensing of railroad employees. 646, n.

14. Construction and maintenance of highways, railroads and other lines of transportation and communication. 646, n.

15. Taxing the instruments of commerce. 647, n.

16. Taxing agents and corporations engaged in interstate commerce. 647, n.

17. Taxing the business or receipts of such commerce. 648, n.

INTERSTATE COMMERCE — POWER OF THE STATES — *Continued.*

18. Taxing the subject-matter of such commerce, freight, passengers, messages, etc. 649, n.
19. Regulating interstate commerce. 650, n.
20. Regulating charges for interstate commerce. 596, n.

POWER OF CONGRESS.

21. To what its power extends. 651, n.
22. To what extent its power is exclusive. 652, n.
23. Its power in all cases paramount. 654, n.

INTERSTATE LAW.

1. *Death by wrongful act—action upon statute of another state.* An action cannot be maintained in Maryland to recover damages pursuant to a statute of West Virginia for wrongfully causing the death of a person in the latter state. *Ash v. Baltimore & Ohio R. Co. (Md.)*, 845.
2. Same question fully considered in note. 851, n.

LIEN.

1. *Of corporation upon its stock.* Where a corporation is organized under a public law which provides that the corporation shall have a lien under all the stock or property of its members invested therein for any indebtedness of such members to the corporation, such law is notice to the world, and a transferee of stock in such company will take it subject to any claim in favor of the corporation, whether he has actual knowledge or notice thereof or not. *George H. Hammond & Co. v. Hastings (U. S.)*, 698.

LIMITATIONS.

1. *Insolvent corporations—when action against stockholder accrues.* Where a corporation, possessed of property subject to levy and sale on execution, though not sufficient to pay all its debts, continues to transact its business, the right of a creditor to enforce the statutory liability of its stockholders does not accrue until an execution, issued upon a judgment against it, has been returned unsatisfied for want of goods whereon to levy. *Barrick v. Gifford (Ohio)*, 690.
2. *Effect of assignment for benefit of creditors.* Where, however, a company, has become insolvent, and made an assignment of all its property for the benefit of its creditors, the right of the creditors, or any of them, then accrues to commence suit against the stockholders on their liability under the statute, without any prior proceeding against the company, and the statute of limitations begins to run from that time against the right of action. *Ibid.*
3. *Suit by one creditor on behalf of all saves the bar of the statute as to all.* A suit commenced by one creditor on behalf of himself and all other creditors of an insolvent corporation to enforce the statutory liability of its stockholders is in the nature of a demand for all, and saves the running of the statute of limitations as against all the creditors who may come in and assert their claims before the final determination of the action. *Ibid.*
4. *Statutory bar of equitable actions.* A statute fixing a limitation of ten years for equitable actions, does not preclude a court of equity from denying

LIMITATIONS — *Continued.*

relief in accordance with equitable principles for unreasonable delay. *Calhoun v. Millard* (N. Y.), 514, n.

5. As to actions against stockholders upon statutory liability, see *Howell v. Roberts* (Neb.), 865; *Wolverton v. Taylor* (Ill.), 869; *Cochran v. Weichers*, (N. Y.), 877, 886, n.

See BONDS, 4, 5; EMINENT DOMAIN, 33; INSURANCE, 52-55.

MARKETS.

1. An ordinance prohibiting the sale of fresh meats within the corporate limits, outside of the market-house of the town, is a valid police regulation. *State v. Pendegrass* (N. C.), 172.

2. Such an ordinance applies to a sale made within the corporate limits, but not at the market-house, though the meats are kept and delivered from a stall outside the limits. *Ibid.*

MUNICIPAL CORPORATIONS.

ACCIDENT CASES — DEFECTIVE STREETS.

1. *Duty and liability in regard to snow and ice upon sidewalk.* The duty of a city to exercise reasonable care to keep its sidewalks in a safe condition does not extend to the removal of ice, which constitutes no other defect than slipperiness, there being no such accumulation of ice as to constitute an obstruction to travel, and no ridges or inequalities of such height, or lying at such inclination or angle as would be likely to trip passengers or cause them to fall. *Henkes v. City of Minneapolis* (Minn.), 211.

2. The duty of the city in this regard is not affected by the fact that the ice is in part the result of artificial causes, as of water escaping from hose, and not wholly of natural causes, such as the fall of rain. *Ibid.*

3. The same subject considered in note. 218, n.

4. *Defective sidewalk — contributory negligence.* Plaintiff was injured by reason of a defective sidewalk. The defect consisted in a loose plank. The plaintiff's companion stepped upon it, the end flew up, and the plaintiff tripped and fell. The sidewalk generally was out of repair. Held, that the plaintiff was not guilty of contributory negligence in using the walk if its condition was such that a person might reasonably expect, by the exercise of proper care, to avoid injury while walking over it. *City of Fort Wayne v. Breese* (Ind.), 237.

5. The plaintiff was injured by reason of a defective sidewalk which had been long out of repair to the knowledge of the plaintiff. Held, that whether she was in the exercise of due care in using it at the time was a question of fact for the jury upon all the evidence, and an instruction, that, if the walk formed the most direct route to her destination, she was not obliged to take a less convenient one because the walk was defective, was erroneous. *City of Sandwich v. Dolan* (Ill.), 552.

6. *Injuries from excavations in street.* A municipal corporation, upon whom its charter imposes the duty to keep its streets in a reasonably safe condition for travel, is liable to persons for injuries caused by neglect to keep proper lights and guards at night around an excavation which it has authorized to be

MUNICIPAL CORPORATIONS — ACCIDENT CASES, ETC. — *Continued.*

made in the street, although it has provided in its contract for such precautions with the contractor. *McAllister v. City of Albany (Or.)*, 200.

7. *Defective grating over cess-pool.* A way is defective when there is a cess-pool in it, with an iron grating or cover having between its bars and rim a space wide enough to receive a horse's foot. *Buck v. Biddeford (Me.)*, 95.

8. *Notice of defect.* In an action to recover damages by reason of a defective way, it appearing that the cover to a cess-pool, which created the defect, was placed there by a street commissioner, held, that no other or further notice is necessary. *Ibid.*

9. *Whole width of city street should be free from defects.* A traveler has the right to presume that he may drive with safety over all parts of a street which is a public thoroughfare of a city. He is not required to leave his team in the middle of the street while stopping, but may drive to the side of the street, and near the curbing. *Ibid.*

10. *But not of town ways.* Towns are not required to render the road passable for the entire width of the whole located limits, or to provide safe and convenient access to them from the premises of adjoining proprietors. *Brown v. Inhabitants of Skowhegan (Me.)*, 57.

11. *Who is a traveler on a highway.* Along the side of the traveled part of a highway, and within the limits of its location, was an open ditch made for draining off the road. The plaintiff, in passing from a school-house to the road, in the darkness, fell into this ditch, and was injured. Held, that he had not become a traveler upon the road, and the town was not liable for the injury. *Ibid.*

12. *Sunday traveling.* Traveling on the Lord's day may be justified on the ground of necessity or as a deed of charity. *Buck v. City of Biddeford (Me.)*, 95.

13. A woman visiting at the plaintiff's house informed him on the Lord's day that she had got to go home that night, a distance of some two miles, on a cold, windy day in December. He thereupon took her home with his horse and sleigh. Held, that the act was not unlawful. *Ibid.*

CONTRACTS.

14. *Awarding contract to lowest bidder.* An ordinance of the city of Baltimore authorized the mayor, comptroller and superintendent of lamps to advertise for proposals for electric lighting, to receive bids up to twelve o'clock of a certain day and award the contract therefor to the lowest responsible bidder. Advertisements were made, and on the day specified the mayor and comptroller at six minutes past twelve, in the absence of the superintendent of streets, and without ascertaining whether any bids had been filed with him, proceeded to open the one bid which had been filed with the mayor, and to award the contract to the bidder therein, the Brush Electric Company. At ten minutes past twelve the superintendent of streets appeared and presented a sealed bid which had been filed within the time, but which they refused to open or consider. Held, that the officers had not proceeded in good faith according to the authority conferred upon them, and the contract with the Brush Company would be enjoined. *Mayor, etc., v. Keyser (Md.)*, 452.

15. *No other damage need be shown than invalidity of contract.* It was not

MUNICIPAL CORPORATIONS — CONTRACTS — *Continued.*

essential to the relief that it should appear what the unopened bid was or that it was lower than the bid of the Brush Company. There was a want of power to make a contract except in the mode and manner prescribed by law, and the complainants have a right to require that the money they have contributed for the public benefit shall be spent only for the purposes, and in the manner, authorized by law. *Ibid.*

POLICE POWER — ORDINANCES.

16. *Prohibiting the obstruction of streets by railroad cars.* The legislative charter of a city, authorizing the adoption of ordinances to prevent the incumbering of streets with carriages, held to authorize an ordinance to prevent the obstruction of streets by railroad cars. *City of Duluth v. Mallet* (Minn.), 551.

17. An ordinance prohibiting the stopping of railroad cars or locomotives on a street crossing for the switching of cars is not *prima facie* unreasonable and void. *Ibid.*

18. *Ordinances — smoking in street-cars.* The ordinance adopted by the council of the city of New Orleans prohibiting smoking in the street-cars is constitutional and valid. *State v. Heidenhain* (La.), 788.

19. *Nuisance — power of city council to determine what is.* There is much discretion left to a municipal corporation for determining what is a nuisance, and the exercise of this discretion will not be judicially interfered with unless the corporation has been manifestly unreasonable and oppressive, invaded private rights, and transcended the authority granted to it. *Ibid.*

20. The city council of New Orleans, to a certain extent, is vested with legislative authority; and it is vested with that discretion, within its authority, common to all legislative bodies. Within the exercise of this legislative discretion, it has authority to determine what is a nuisance, and to pass the necessary ordinances to suppress it. *Ibid.*

21. *Markets.* Power to establish and regulate. 174, n.

POWERS.

22. *Power to authorize use of streets for private switch tracks.* This was a bill by an abutting owner to enjoin the construction and maintenance of private switch tracks upon and across certain public streets of St. Louis, to connect the defendant's brewery with the tracks of a railroad company. Held, that the city could not, under its general power, "to regulate the use" of the streets, grant authority to lay down tracks for private use; that the power to regulate was a trust to be exercised for the purpose of keeping the streets open and free for all, which would be violated by the proposed use. *Glaessner v. Anheuser-Busch Brewing Ass. et al.* (Mo.), 420.

23. *Who may maintain bill to enjoin such use.* An abutting owner, whose property is situated within seventy-five feet of a proposed crossing and will be depreciated by the proposed tracks, and from whose premises travel and trade will be diverted, sustains special damages, entitling him to maintain a bill to enjoin the proposed and unlawful use of the streets. *Ibid.*

RAILROADS IN STREETS.

24. *Liability of municipality.* A municipal corporation, which grants permission to use a street for railroad purposes, is not, on that account, liable to the abutting owner for damages. *Burkham v. Ohio & Miss. R. Co.* (Ind.), 88.

MUNICIPAL CORPORATIONS — *Continued.*

SURFACE WATER, DRAINS AND SEWERS.

25. *Liability for flooding caused by overflow from sewer.* Plaintiff had a prescriptive right to discharge the water from his land by a drain to a certain culvert which connected with a box drain. By reason of obstructions in the culvert and box drain, and the leading of additional sewers into it, the water from which operated as a sort of dam upon the plaintiff's drain, the water was set back through his drain and flooded his premises. Held, that if the town had been negligent in not keeping the culvert and box drain free from obstructions, or in making the box drain too small or in constructing and maintaining other drains that by themselves, or in connection with the culvert, made a faulty arrangement for disposing of the surface-water, and thus caused the damage complained of, it would be liable. *Bates et al. v. Inhabitants of Westborough (Mass.)*, 114.

26. So it will be liable for a flooding caused by the negligent construction, management or obstruction of its sewers or drains. *Borough of Bethlehem v. Hans (Penn.)*, 121, n.

27. In Maine, where it was made the duty of the officers of towns by a general law, whenever they should deem it necessary for the public health or convenience, to construct public drains or sewers at the expense of the town, it was held the town was not liable for damages arising from negligence in the discharge of such duty. The decision is put on the ground that under this statute the officers act, not as agents of the town, but of the sovereign authority of the state. *Bulger v. Inhabitants of Eden (Me.)*, 121, n.

28. Where a city acquired property on which was a private drain, it was held that it was not thereby bound to keep it in order for the benefit of one who had a right to use it. *Kosmak v. Mayor, etc., of New York (N. Y.)*, 121, n.

29. *Changing or interfering with flow of surface-water.* A natural embankment or barrier prevented the surface-water accumulating upon a large tract of land from flowing upon the plaintiff's premises. The defendant, as road commissioner, caused a drain to be cut through this embankment whereby a large amount of such water was caused to flow upon the plaintiff's lands over intermediate lands. The defendant was held liable for the damages. *Chapel v. Smith et al. (Mich.)*, 121, n.

30. If a municipal corporation by the improvement of its streets causes surface water to flow upon the lands of a proprietor where it was not accustomed to flow it will be liable. *Torrey v. City of Scranton (Penn.)*, 19 Atl. Rep'r, 351; *Slack v. Lawrence Township (N. J.)* 121, n.

31. Liability for obstruction of access and erosion by ditch in street. *Town of Longmont v. Parker (Col.)*, 91, 94, n.

MUTUAL BENEFIT SOCIETIES.

1. *Insanity is sickness or disability.* The constitution and by-laws of a mutual benefit society, provided that every member "who, through sickness or other disability, is unable to follow his usual business," etc., should be entitled to a certain sum weekly. Held, that insanity was sickness or disability within the meaning of the constitution and by-laws. *McCullough v. Expressman's Mutual Benefit Association (Penn.)*, 309.

See INSURANCE.

NEGLIGENCE.

BANKS.

1. *Care of collaterals and special deposits.* It appeared that the bank kept no account of securities so held except when in actual use as collateral, made no examinations for the purpose of ascertaining that they were on hand, and in no way looked after their safety. It also appeared that the by-laws of the bank required an examination every three months, by a committee, of all matters pertaining to the affairs of the bank, and that such examination was in fact made every three months of the assets of the bank. Held, that there was sufficient evidence to sustain a finding of negligence. *Ouderkirk v. Central National Bank (N. Y.)*, 357.

2. Evidence of the want of such care as the bailee generally bestows upon his own property, is strong and persuasive evidence of negligence on his part with respect to the property bailed. *Ibid.*

CONTRIBUTORY NEGLIGENCE.

3. *Giving seat to lady.* It cannot be held as matter of law, that a passenger surrendering his seat to one less able to stand than himself, contributes to an injury caused by the carrier's negligence, but which would not have been received had he remained in his seat. *Lehr v. Steinway, etc., R. Co. (N. Y.)*, 240.

4. *Knowledge of defect causing the injury.* See 158, n., 240, n., 556, n.

5. A conductor of a freight train was killed by reason of getting his foot caught in open frog while attempting to make a coupling. There was evidence tending to show that the deceased knew or had reason to believe that the frog in question was open. Held, that whether he was guilty of negligence in not having it in mind at the particular time and place of the accident was a question of fact for the jury. *Seley v. Southern Pac. Ry. Co. (Utah)*, 151.

6. *Riding on platform of car.* Street cars. *Lehr v. Steinway, etc., R. Co. (N. Y.)*, 240, 243, n.

7. Of steam railroads. 249, n.

8. Of elevated railroads. 250, n.

9. Contributory negligence of children. 199, n.

FELLOW-SERVANTS.

10. One, whose duty it is to fill the sand-box of an engine with sand, is a fellow-servant with the brakeman on the engine, and the latter cannot recover for an injury due to the neglect of the former to fill the box properly. *Louisville, New Orleans & Texas Railway Company v. Petty (Miss.)*, 169.

11. An assistant road master having charge of one hundred and fifty miles of defendant's railroad and control of all section gangs in that distance, held to represent the company and not to be a fellow-servant with one of the section hands working under his immediate directions in loading a car. *Harrison v. Detroit, etc., R. Co. (Mich.)*, 171, n.

12. A road master in charge of a working train and with power to employ and discharge the men, held to be a fellow-servant with a section hand riding on the train. *Galveston, etc., R. Co. v. Smith (Tex.)*, 171, n.

13. A switchman was killed by lumber falling from a car which was negligently loaded by other servants of the company. Held, that the latter and the switchman were fellow-servants. *Ford v. Lake Shore & M. S. Ry. Co. (N. Y.)*, 171, n.

NEGLIGENCE — FELLOW-SERVANTS — *Continued.*

14. The foreman of a gang employed in removing stones from near the track is a fellow-servant with the members of the gang. *Kinney v. Corbin* (Penn.), 171, n.

15. One engaged in coupling cars was injured by falling into a pit negligently left uncovered by other employees of the company who had removed the covering to make repairs. Held, negligence of fellow-servants. *Filbert v. Delaware & H. Canal Co.* (N. Y.), 171, n.

16. A brakeman and a car inspector held not to be fellow-servants. *Daniels v. Union Pac. Ry. Co.* (Utah), 171, n.

17. So as to yard switchmen and the engineer of the locomotive used in switching. *Louisville, etc., R. Co. v. Sheets* (Ky.), 171, n.

18. Plaintiff in error was engaged in operating a railroad, and for the purpose of securing the removal of his coal from the coal pocket into the tender, gave an independent contract to one H. to place the coal in the proper pocket prepared by the plaintiff in error, and from which to load the tenders of the locomotives by which the line was operated. H. hired his own assistants, paying them out of his own means, by whom alone they were employed and discharged, and to whom alone they looked for their compensation. Defendant in error was employed by him to assist in this work, his duty being to notify the engineers as to the proper position in which their engines should be placed for receiving the coal, and to place the coal in the tender; but in which the engineer rendered no assistance. It was the duty of the engineer to place the engine in its proper place, leaving it stationary until the coal was loaded; but in the discharge of which he received no assistance from defendant in error. It was held that the engineer and defendant in error were not fellow-servants, under the rule exempting the railroad company from damages resulting from the negligent act of fellow-servants. *Union Pac. Ry. Co. v. Billeter* (Neb.), 171, n.

19. Plaintiff was employed by the city as a laborer, excavating a trench in the earth for the laying of water-pipes. Upon other laborers in the same employment, and working in connection with plaintiff, devolved the duty of putting in wooden curbing as the work of excavation progressed, and as the laborers saw the need of it, to prevent the earth falling into the trench. Held, that such laborers were fellow-servants with the plaintiff, for whose negligence in putting in the curbing the city was not responsible. *Bergquist v. City of Minneapolis*, (Minn.), 172, n.

20. A crew of men, of which plaintiff was one, was engaged in repairing a bridge on defendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened, and was blown shut by the wind, and injured the plaintiff while at work between the stationary part of the bridge and draw. Held, that defendant was not liable. *Johnson v. St. Paul, etc., Ry. Co.*, (Minn.), 172, n.

IMPUTED NEGLIGENCE.

21. *Of adult to child.* An infant of tender years is not to be charged with the negligence of the person having it in charge. *Newman v. Phillipsburgh Horse-Car Co.* (N. J. L.), 736.

NEGLIGENCE—IMPUTED NEGLIGENCE—*Continued.*

22. The plaintiff, about two years of age, being under the care of her adult sister, wandered onto the track of a horse-railroad, and was there run over by the carelessness of the driver of the car. Held, that plaintiff's right of action was not lost, even if the sister's carelessness of supervision, in part, was the cause of her injury. *Ibid.*

23. *Of driver to occupants of vehicle.* Plaintiff's husband died of injuries which he received while riding in a public hack, which was run into by a train while crossing defendant's tracks at a highway crossing. Held, the negligence of the driver could not be imputed to the deceased, and that plaintiff could recover, if the deceased's injuries were due to the negligence of the defendant, though the driver's negligence also contributed thereto. *Becke v. Missouri Pac. Ry. Co. (Mo.)*, 657.

24. Imputed negligence generally. 663, n, 741, n.

MISCELLANEOUS.

25. *Failure to have head-light after dark may be negligence per se.* It is not error to declare to the jury as matter of law that for a train to approach a public crossing near a city after dark without the head-light burning is negligence. *Becke v. Missouri Pac. Ry. Co. (Mo.)*, 657.

26. *Negligence a question for the jury.* After waiting a reasonable time for cars blocking a highway to be removed a pedestrian may lawfully go upon the company's grounds to void the obstruction. While upon the company's grounds, under such circumstances, the diligence for his safety due from the company, as well as his own diligence in guarding against danger, is for determination by the jury. If the jury think his presence ought to have been foreseen or anticipated, ignorance of it would make no difference. Particular means or measures of diligence appropriate for use by each party should be left to the jury. *Smith v. Savannah, etc., R. Co. (Ga.)*, 855.

27. *Presumption of negligence from derailment.* See *Arkansas Midland R. Co. (Ark.)*, 811, 818, n.

28. *Fires from locomotives.* See *Mills v. Chicago, etc., R. Co. (Wis.)*, 161, 164, n.

29. *Precautions after the accident.* Proof of. *Gulf, etc., R. Co. v. Compton, (Tex.)*, 97, 105, n.

See BANKS, 5-9; INSTRUCTIONS; MUNICIPAL CORPORATIONS, 1-18; RAILROADS, 1-35; TELEGRAPH AND TELEPHONE COMPANIES, 6-16.

NOTICE.

1. *To purchasers of stock.* What amounts to notice and effect thereof that stock has been fictitiously issued as fully paid. 288, n.

See STOCK AND STOCKHOLDERS.

OFFICERS.

See BONDS, 11; DIRECTORS AND OFFICERS.

PASSENGERS.

See CARRIERS; RAILROADS.

PENAL STATUTES.

1. Statutes imposing a liability upon stockholders or officers of corporations,

PENAL STATUTES — *Continued.*

when penal. See *Howell v. Roberts* (Neb.), 365; *Wolverton v. George H. Taylor* (Ill.), 369; *Cochran v. Weichers* (N. Y.), 377, 381, n.

2. Effect of holding such statutes penal. 386, n.

PLEADING AND PRACTICE.

1. *Arrest of judgment.* In a suit against two companies jointly for an injury at a railroad crossing, one company owning the tracks and the other operating the train which caused the injury, in order to render the former liable, it should be averred and proved that the use of the tracks by the latter was by its authority or permission. But an averment that the company whose negligence caused the injury had control and occupation of the tracks will be sufficient after verdict, since the reasonable intendment is, that such control and occupation is by the consent of the owner. *Pennsylvania Co. v. Ellett* (Ill.), 526.

2. *Decree assessing stockholders a unit—when reversed as to one must be reversed as to all.* In this case there had been a former decree finding the amount to be raised from unpaid subscriptions and the amount to be paid by each stockholder. On the appeal of certain stockholders this decree was reversed. Subsequently the decree now appealed from was entered, which was for a different amount. Held, that an appellant from the last decree, who did not appeal from the former decree, could not complain of the former reversal as to him, especially as that decree required him to pay a larger sum. *Alting v. Ward* (Ill.), 727.

3. *Equity pleading.* Where the defendant in an equity suit files a plea in abatement in proper form, and at the proper time, and at the same time files his answer formally pleading the same matters therein, and said answer is duly sworn to, the said matter in abatement will be treated as properly put in issue, although the said plea is not sworn to. *Toledo Tie & Lumber Co. v. Thomas et al.* (W. Va.), 251.

4. *Parties, when some of a class may sue for all.* The citizens of Thomaston have, as a class, a special and particular interest in the matter involved in this cause, and can support an action for the protection of that interest. The class being composed of numerous individuals, some may sue in behalf of all, the interest involved being common to the whole class. *Macon, etc., R. Co. v. Stamps* (Ga.), 537.

5. *Production of books and papers.* Where a defendant has refused to produce books and papers upon proper notice, and the plaintiff has given secondary evidence of their contents, the defendant will not then be permitted either to produce the books and papers, or to give oral evidence thereof, to meet such secondary evidence. *Mather v. Eureka Mower Co.* (N. Y.), 410.

6. *Special verdicts.* Where a verdict may be sustained upon different views of the evidence, the jury need not concur in any particular view. If particular questions are put to them to be answered, involving such different views, an answer thereto that they fail to agree is not necessarily inconsistent with a general verdict, but if a particular question *must* be answered before they can find a verdict, an answer that they failed to agree thereon would be inconsistent with a general verdict. *Arkansas Midland Ry. Co. v. Canman* (Ark.), 311.

PLEADING AND PRACTICE — *Continued.*

7. *Joinder.* Of owners of separate lots, to enjoin railroad in street. 151, n.
 8. *Multifariousness.* A bill to enjoin a railroad in a street and to recover damages to the plaintiff's property is not multifarious, as the damages are an incident to the equitable relief. *Shepard v. Manhattan Ry. Co.* (N. Y.), 151, n.
 9. *New trials.* Where, according to the weight of the evidence, there is grave doubt whether the plaintiff ought to recover any thing, the court below is warranted in granting a new trial, even a second new trial, if the damages found by the jury are extreme or excessive. *Smith v. Savannah, etc., Ry. Co.* (Ga.), 355.
- See ACTIONS; APPEAL; BOOKS AND RECORDS; CORPORATIONS, 1; DAMAGES; LIMITATIONS; RAILROADS, 31-33.

POLICE POWER.

See CHARGES, REGULATION OF; CONSTITUTIONAL LAW; INTERSTATE COMMERCE; MUNICIPAL CORPORATIONS, 16-21.

RAILROADS

ACCIDENTS AT CROSSINGS.

1. *Evidence of negligence.* This was an action against the Pennsylvania Company and the Union Stock-Yards and Transit Company for negligently causing the death of the plaintiff's intestate. The accident occurred at the crossing of four tracks which belonged to the latter company, and was caused by a train of the former company which was being backed over the crossing. There was evidence tending to show that no warning was given of the approach of the train, and that no one was on the rear of it to give warning; also, that the deceased was in the exercise of due care. Held, that the court properly refused to take the case from the jury. *Pennsylvania Co. et al. v. Ellett* (Ill.), 526.
2. *Liability of company owning the tracks.* The stock-yards company, being vested with the franchise of constructing and operating the railroad, is responsible for injury resulting from the negligent operation of the road, whether by itself or by those whom it authorizes or permits to use it. *Ibid.*
3. In such case the servants and agents of those operating the road will be regarded as the servants and agents of the company owning the road. *Ibid.*
4. These rules apply as well to a stock-yards company as a railroad company, where the franchise of constructing and operating the tracks is conferred upon the former company with the right to exercise the power of eminent domain for that purpose. *Ibid.*
5. *Collision with team.* The plaintiff's team, loaded with a portable engine and boiler, became stalled on a crossing over the defendant's road, and was run into by a train and damaged. Held, that whether plaintiff was guilty of negligence or not in being on the crossing at the time, it was the duty of the defendant's servants in charge of the train, as soon as they discovered or had reason to believe that the team was stalled, to use every means to stop the train and prevent a collision, and that if they failed to exercise ordinary care in that behalf, the defendant was liable. A judgment for the plaintiff was affirmed. *Bullock v. Wilmington & W. R. Co.* (N. C.), 336.

RAILROADS—ACCIDENTS AT CROSSINGS—*Continued.*

6. *Duty to avoid injury to one wrongfully on track.* "Even if the plaintiff did not exercise due caution in venturing upon the track under all the circumstances, still the defendant was liable to answer in damages for the injury sustained, if, by the exercise of ordinary care on its part, it might have been prevented." *Ibid.*

7. *Going upon company's grounds to avoid obstruction.* After waiting a reasonable time for cars blocking the highway to be removed, a pedestrian may turn aside to avoid the obstruction, and pass over the company's inclosed grounds. In so doing, he will be no trespasser. *Smith v. Savannah, etc., R. Co. (Ga.), 355.*

ACCIDENTS TO EMPLOYEES.

8. *Injury to brakemen—collision with horse on the track.* Where it is the duty of a railroad company by statute to maintain fences along its right of way, and it permits them to become out of repair, and, in consequence of such want of repair, a horse escapes upon the track and causes the wreck of a train, the company will be liable to a brakeman on the train, who, without his fault, is injured in the wreck. *Donegan v. Erhardt, Receiver (N. Y.), 228.*

9. *Coupling cars—open frog.* Plaintiff's intestate, a conductor of a freight train on the defendant's road, while attempting to make a coupling, got his foot caught in an open frog and was run over and killed. It appeared that a device known as a "safety block" was in use and well known, and would have prevented the accident. Held, that the defendant was negligent in not using it. *Seley v. Southern Pacific Ry. Co. (Utah), 451.*

10. *Duties of conductor.* It appeared that it was the duty of the conductor to get his train through on time, and that he assisted in switching and making couplings, if necessary. Two brakemen had attempted to make the coupling and failed. The deceased then made the attempt. Held, that he was not acting outside of his duties as conductor. *Ibid.*

11. *Injury to brakeman—collision.* Plaintiff's intestate was a fireman on a water train operated by appellant on a single-track road and was killed by a collision with a passenger train. A conversation between the engineer of the water train and a telegraph operator in reference to the point of meeting the passenger train was held to be admissible as a part of the transaction. *Gulf, C. & S. F. Ry. Co. v. Compton (Tex.), 97.*

12. *Running train without a conductor.* Though the proof showed that it was customary for railroads to equip such trains with a conductor, engineer, fireman and brakeman, yet the operation of the train in question without a conductor was not necessarily negligent, but the question would be whether that method was, under the circumstances, reasonably safe. *Ibid.*

ACCIDENTS TO PASSENGERS. See CARRIERS.

ACCIDENTS TO PERSONS ON TRACK.

13. Plaintiff's daughter, a child under five, in charge of one Mrs. D., while crossing a bridge forming part of defendant's road, was run over and killed by a train running at the rate of twenty-five miles an hour in violation of a statute. If it had been running at the statutory speed, the train could have been readily stopped before reaching the deceased, after they were seen

RAILROADS — ACCIDENTS TO PERSONS ON TRACK — *Continued.*

by the engineer. Held, that there was a clear case of negligence on the part of the company. *Hooker v. Chicago, etc., R. Co. (Wis.)*, 198.

14. *Permitting public to use bridge.* The evidence showed that the people residing in the vicinity of the bridge had been accustomed to use it without objection or warning by the company. Held, that the deceased were not trespassers but licensees. *Ibid.*

15. *Trespassers on track.* Persons trespassing upon a railroad track cannot recover for injuries received unless the same are due to the wanton or willful negligence of the company. *Roden v. Chicago, etc., R. Co. (Ill.)*, 199, n.

16. The rule applies to children of tender years as well as to adults. *Pennsylvania R. Co. v. McMullen (Penn.)*, 199, n.

17. Where a railroad track has been used as a foot-way for twenty years by people residing in the vicinity with the knowledge of the company, such persons are to be regarded as licensees, and it is the duty of the company, in operating its trains, to take notice that persons are liable to be on the tracks and to exercise care accordingly. *Whalen v. Chicago, etc., R. Co. (Wis.)*, 199, n.

DEATH BY WRONGFUL ACT.

18. Action under statute of foreign state. 851, n.

EJECTING PASSENGER.

19. What a sufficient justification. *Chicago City Ry. Co. v. Pelletier (Ill.)*, 616.

FENCING TRACK.

20. *Duty to fence track independent of statute.* In the absence of any statute requiring the company to fence its road, circumstances may exist in which it would be the duty of the company at common law to build and maintain such fences for the safety of those employed or riding on its trains. *Donegan v. Erhardt (N. Y.)*, 228, 231, n.

21. *Statute construed.* A statute provided that in case of failure to build or keep in repair a fence as required, the company should be liable for the damages done by its agents or engines to any cattle, horses, sheep or hogs thereon. Held, that the statute was not intended to limit liability to the instances specified, but that such instances were specified because, in the absence of the statute, it would be the duty of the owner to restrain his stock, and the company would not be liable for its destruction while trespassing on its right of way. *Ibid.*

22. Whether statutory duty to fence is for the benefit of children. 231, n.

23. Whether such statutes are for the benefit of travelers and employees. 232, n.

FRIGHTENING HORSES AND STOCK.

24. *Cable-cars — frightening horses.* Plaintiff's horses, which were standing in the street, became restive at the approach of a grip-car. Plaintiff went to their heads to quiet them. The car stopped near the horses, and the ringing of the bell frightened them so that they broke away and injured the plaintiff. The car was near a crossing at the time. Held, that a nonsuit was properly directed by the trial court; that it was proper to ring the bell when approach-

RAILROADS—FRIGHTENING HORSES AND STOCK—*Continued.*

ing a crossing, and that no negligence of the company was shown. *Steiner v. Philadelphia Traction Co.* (Penn.), 485. See, generally, 487, n.

FIRES FROM LOCOMOTIVES.

25. *Setting fires—contributory negligence.* One of defendant's engines set fire to combustible material on its right of way, from which the fire spread to the plaintiffs' cranberry marsh and caused the damage sued for. One of the plaintiffs was at work about three-fourths of a mile from where the fire started and saw the smoke about fifteen minutes after the engine passed. He stopped with his men to eat dinner before going to the fire and arrived some ten or fifteen minutes later than he might have done. It was then impossible to extinguish it. Held, that although the plaintiffs were guilty of negligence in not going immediately to the fire, yet if they could not have put out the fire had they gone without delay, the plaintiffs could recover. *Mills v. Chicago, M. & St. P. Ry. Co.* (Wis.), 160.

26. *Evidence as to negligence of company.* Where the evidence tended to show a faulty construction of the damper and ash-pan which facilitated the escape of coals, and also that the same engine set three other fires the same day within a mile of the one complained of, it was held that the question of the company's negligence was properly left to the jury. *Ibid.*

27. *The law of negligence in such cases.* The fact that a fire is kindled by sparks from a locomotive is presumptive evidence of negligence on the part of the railroad company. *Daly v. Chicago, etc., Ry. Co.* (Minn.), 164, n.

28. Such presumption is not rebutted by merely showing that such engine was provided with the best and most approved appliances, but it must also be shown that such appliances were in good order and repair, and that there was no negligence in their use. *Chicago, etc., R. Co. v. Goyette* (Ill.), 164, n.

29. It is negligence to allow an accumulation of dry grass or other combustible material upon a railroad right of way. *Kelsey v. Chicago, etc., Ry. Co.* (S. D.), 164, n.

30. *Pleading.* In actions of this character the declaration or complaint should identify, as nearly as possible, the particular engine which set the fire, in order that the company may investigate its condition and management at the time. *Koontz v. Oregon Ry. & Nav. Co.* (Or.), 164, n.

31. An allegation that an engine of the defendant at the time and place specified, caused the destruction of the plaintiff's property by reason of negligence, etc., is not sufficient. *Ibid.*

32. An averment in a complaint that "while the defendant was running a locomotive over its track, sparks and fire escaped from the locomotive, and negligently set fire to grass upon the plaintiff's land, and burned and destroyed etc., and that said fire, injury and damage were not in any manner caused by the act, fault or neglect of the plaintiff, but wholly by the negligence and carelessness of the defendant," was held good on demurrer, though not aptly worded. *Ohio, etc., Ry. Co. v. McCartney* (Ind.), 165, n.

33. *Evidence.* In consequence of the difficulty in identifying a passing engine, so as to make direct proof of negligence, and for the reason that the business of running railroads supposes a unity of management and a similarity in construction of the engines, the admission of evidence, as to other and

RAILROADS—FIRES FROM LOCOMOTIVES—*Continued.*

distinct fires from the one alleged, is permitted. *Koontz v. Oregon Ry. & Nav. Co. (Or.)*, 165, n.

84. But where the particular engine which set the fire is known, evidence that another of the defendant's engines set a fire at another time and place is inadmissible. *Ireland v. Cincinnati, etc., R. Co. (Mich.)*, 165, n.

HIGHWAYS.

35. Obstructing with cars an indictable offense. 552, n.

86. Whether company may be compelled to construct or repair crossings. 222, n., 669, n.

LATERAL RAILROADS.

87. Whether a public use. 424, n.

LESSEE.

88. *Liability of the owner of a railroad for injuries occasioned by the negligence of its lessee or licensee.* 532, n.

RAILROADS IN STREETS.

89. *Abutting owners—rights and remedies of.* 44, n., 750, n.

40. *Additional track.* A railroad was located along a public street, the fee of which was in the abutting owners. Proceedings were had and damages assessed to the abutting owners. Afterward an additional track was constructed in the street on the side toward plaintiff's lot. It was held that by the condemnation proceedings the company acquired the right to construct such additional tracks as might be necessary for their business without any further liability to the abutting owners. *White v. Chicago, St. L. & P. R. Co. (Ind.)*, 138.

41. *Dummy road on highway.* A street railway, operated by a steam-motor or dummy engine, carrying only passengers and stopping at street crossings like horse-cars, is an additional burden on the fee of the street, and cannot be authorized without compensation to the owner of the fee. *East End Street Ry. Co. v. Doyle (Tenn.)*, 747.

42. *Elevated railroads—damages to abutting property—how estimated.* In estimating the damages to abutting property by reason of an elevated railroad in front of it, any benefits peculiar to the property in consequence of the construction of the road should be taken into consideration, although the statute provides that in determining the compensation to be made for property taken, no allowance or deduction shall be made "on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railway." *Newman v. Metropolitan Elevated Ry. Co. (N. Y.)*, 318.

43. *Benefits not to be considered.* The general increase of values resulting from the construction of railroads and other improvements, belongs to the property-owner, and is not to be taken into consideration in estimating his compensation for property taken or damaged. *Ibid.*

44. *Elevated railroads—remedy of abutting owners.* Plaintiff owned four lots on Fifty-third street which he used for a carpenter shop and lumber yard. The defendant constructed an elevated railroad on the street, and this was a

RAILROADS — RAILROADS IN STREETS — *Continued.*

suit for damages. Held, that the plaintiff had his option to enjoin the construction of the road until his compensation was adjusted by agreement or condemnation, or to bring successive actions at law for the damages suffered from time to time. *Tallman v. Metropolitan El. Ry. Co. (N. Y.), 825.*

45. *Measure of damages.* In an action at law the recovery would be limited to the diminution in the rental or usable value of the lots up to the commencement of the suit. *Ibid.*

46. *Speculative damages.* Such diminution in usable value should be estimated with reference to the actual use of the premises, and not with reference to proposed uses which were not in fact made, and evidence as to plans of proposed houses, the cost of the same and the difference in the rental value thereof with and without the road is improper. *Ibid.*

47. *Elevated railroads — exemplary damages for occupying street.* The fact that an elevated railroad company neglects for five years after constructing its road in a public street to have the rights of abutting owners condemned, during which time the question of such owners' right to compensation was in litigation, and was the subject of great diversity of views on the part of lawyers and judges, will not justify the giving of exemplary damages in a suit by an abutting owner to recover for damage to his property. *Powers v. Manhattan Ry. Co. (N. Y.), 853.*

48. *Effect of the transfer of the property on the right of recovery.* Where the plaintiff was divested of her title to the property in question after the construction of the road, it was held no bar to her recovery for damages which had accrued prior to such divestiture. Nor did it make any difference that this divestiture of title was accomplished by the foreclosure of a mortgage made prior to the construction of the road. *Porter v. Met. El. R. Co. (N. Y.), 325, n.*

49. *Estoppel to claim damages.* An abutting owner who consents to the use of the street by a railroad company cannot afterward enjoin the use of the street or recover damages therefor. *Burkham v. Ohio & Mississippi Ry. Co. et al. (Ind.), 88.*

50. *Liability of municipality.* A municipal corporation, which grants permission to use a street for railroad purposes, is not, on that account, liable to the abutting owner for damages. *Ibid.*

51. *Liability of the railroad company.* In such case the remedy is against the railroad company, but if there is no substantial damage there can be no recovery. *Ibid.*

52. *Estoppel to claim damages.* When the owner of a lot consents to the construction of a railroad on the street in front of it and the road is built and afterward the lot is sold, there is a waiver of damages by reason of the road which is binding upon the purchaser. *Merchants' Union Barb-Wire Co. v. Chicago, etc., R. Co. (Iowa), 151, n.*

53. *Injunction.* A bill will not lie to enjoin the construction and use of a railroad upon the street in front of the plaintiff's lot, unless such construction and use will specially interfere with the plaintiff's ingress and egress to and from the premises. *Paquet v. Mt. Tabor Street R. Co. (Or.), 151, n.*

54. When a statutory authority to lay down a railroad in a street is condi-

RAILROADS — RAILROADS IN STREETS — *Continued.*

tioned upon the payment of damages to abutting property, an injunction will lie to prevent the construction of the road before the payment of the damages, although both the property-owner and the company have the initiative in proceedings to have the damages assessed. Georgia, etc., R. Co. v. Ray (Ga.), 151, n.

55. *Viaduct over railroad.* Where a company was authorized to construct its road upon a city street, and was required to construct an embankment on an intersecting street so as to carry the latter over the track, it was held that, as the city could have constructed the embankment without liability to abutting property, it could authorize the railroad to do so with like exemption. Ravenstein v. New York, etc., R. Co. (N. Y.), 151, n.

RIGHT OF WAY.

56. *Parol gift of right of way — estoppel.* Where the owner of a quarter section of land makes a parol gift of a right of way across the same to a railroad company, which enters, stakes off a strip one hundred feet wide and constructs its road thereon, and continues to operate the same, it being authorized by law to acquire not exceeding one hundred feet for that purpose, both the owner and his grantees will be estopped to claim, not only the land actually occupied by the company, but also the entire strip of one hundred feet. Hargis v. Kansas City, U. & S. Ry. Co. (Mo.), 329.

57. *When width not specified, one hundred feet will be presumed.* Although in a parol gift of a right of way no width is mentioned or specified, one hundred feet will be presumed as intended by the parties, that being the maximum allowed by law, and an entry and occupation by the company will be construed to extend to the whole hundred feet. Ibid.

58. Indefinite grant of right of way. 335, n.

59. Oral gift of right of way, effect of. 336, n.

60. *Second railroad on right of way — right to compensation.* A railroad company cannot authorize a second company to construct a road on its right of way without additional compensation to the owner of the fee. Forth Worth & Rio Grande Ry. Co. v. Jennings (Tex.), 121.

61. *Power of company to convey part of its right of way.* A railroad company cannot convey a part of its right of way separate from its franchises, so as to authorize another company to construct a railroad thereon, without additional compensation. Ibid.

62. *Rights in land condemned for railroad right of way.* When the demurrer to a petition is sustained, and the plaintiff elects to stand upon his petition and the facts stated therein, and judgment is rendered against him for costs, no motion for a new trial is necessary to have the question of the sufficiency of the petition reviewed in this court. Earlywine v. Topeka, etc., Ry. Co. (Kans.), 533.

63. The company limited by maxim *sic utere tuo ut alienum non laedas*. 536, n.

64. Right to trees, herbage, material, etc. 536, n.

65. Right of possession, whether exclusive. 537, n.

SPEED.

66. *Statute construed.* A statute of Wisconsin provides that, in all cities

RAILROADS — SPEED — *Continued.*

and villages, no train or locomotive shall go faster, until after having passed all the traveled streets thereof, than at the rate of six miles an hour. Held, to prohibit running faster than the above rate, after having entered a city and before reaching any traveled street. *Hooker v. Chicago, M. & St. P. R. Co.* (Wis.), 193.

STATIONS AND GROUNDS.

67. *Duty as to establishing and maintaining stations.* It is the duty of railroad companies to establish and maintain stations at such points as will best accommodate the public, and it cannot be compelled to continue a station which does not meet this requirement. *Mobile & Ohio Railroad Co. v. People, ex rel, etc.* (Ill.), 476.

68. *Moving station.* A railroad company moved a station from a small village, about half a mile, where it was more convenient for the greater number of people using the station. The business of the village was not sufficient to support a station. Held, that the company would not be compelled to keep up a station at the village. *Ibid.*

69. *Depot platform—negligence.* At a county station of defendant, the platform was from fifteen to thirty inches from the ground. There were no steps. A plank had been placed from the ground to the platform, leading to which was a well-defined path, and persons had been accustomed to use this plank in coming to or leaving the depot. As the plaintiff was going to the depot the plank slipped and fell and she was injured. It was held that the defendant was bound to provide a safe means of reaching the station, and, if it permitted an unsafe means to be used for that purpose, it was liable to the same extent as though it had provided that means itself. It was competent to show how long and to what extent the plank had been used. A judgment for the plaintiff was affirmed. *Collins v. Toledo, etc., Railroad Co.* (Mich.), 557.

70. *Duty of railroad companies as to station and its approaches.* It is the duty of railroad company to keep its stations, and the platforms and approaches appurtenant thereto, in a safe condition for passengers and others entitled to use the same, and the company will be liable for injuries resulting from a breach of this duty. 560, n.

71. *Specific performance of agreement to locate station.* A railroad company, in consideration of the grant of a right of way over certain premises, agreed with the owner to establish a station thereon and to stop thereat five express trains each way daily. On a bill for the specific performance of this agreement it was found that the place was in a mountain gorge, near a sharp curve and on steep grade; that a station there would accommodate but few, and would greatly delay and inconvenience the public. Held, that specific performance should not be granted but plaintiff left to his remedy at law. *Conger v. New York, W. S. & B. R. Co.* (N. Y.), 190.

See CARRIERS; CHARGES, REGULATION OF; CONSTITUTIONAL LAW; INTER-STATE COMMERCE; NEGLIGENCE.

REAL PROPERTY.

See CORPORATIONS, 8.

RECORDS.

See BOOKS AND RECORDS.

REPORT.

See STOCK AND STOCKHOLDERS, 4, 16, 17.

SLEEPING-CAR COMPANIES.

1. *Servants of, to what extent servants of railroad company.* The plaintiff was a passenger on one of the defendant's trains from Geneva to New York, which had been detained by a washout. He also occupied a section in a sleeping-car attached to the train. It became necessary to remove to a special train for Utica, to which the porter assisted him. The two then had some words about the plaintiff's sleeping-car ticket, which the porter had and refused to give up. The journey was to be completed on a special train from Utica, and the plaintiff insisted on something as evidence of his right to sleeping-car accommodations. The porter then accompanied the plaintiff outside the train to introduce him to the sleeping-car conductor. The porter pointed out the conductor and turned to go. The plaintiff insisted on something more, and took hold of his sleeve to detain him, whereupon the porter struck him a severe blow in the face, inflicting the injuries for which the suit was brought. Held, that the porter was the servant of the defendant when engaged in the performance of its duties and obligations toward its passengers, and that the defendant was liable for his acts while so engaged the same as if it employed and paid him. *Dwinelle v. New York Central, etc., R. Co. (N. Y.), 492.*

2. Whether the porter was at the time engaged in the line of his duties as a servant of the defendant company was a question of fact for the jury. *Ibid.*

3. *Duties involved in the contract of carriage.* It is the duty of the servants of the carrier to afford the passenger, or assist him in obtaining, such information as may be necessary to enable him to complete his journey successfully. In this case it cannot be said as matter of law that the porter had completed his duty to the plaintiff, but it is a question of fact for the jury whether he was acting at the time in the line of his duty. *Ibid.*

SPECIFIC PERFORMANCE.

1. Of agreement to build depot. 198, n.

STATUTES.

1. *Remedy to prevent illegal act, waste, etc., by officers of town.* An act authorized tax payers to prosecute an action to prevent "any illegal act" or "waste or injury to any property, funds or estate" of the town, etc. A tax had been levied and collected for the payment of interest on bonds which the court considered illegal but which the town had long recognized as valid and which equity would not relieve against. Held, that payment of the interest would not be an "illegal act" or "waste" within the meaning of the statute, and an injunction to prevent such payment was refused. *Calhoun v. Millard (N. Y.), 514.*

See STREET RAILROADS; TELEGRAPH AND TELEPHONE COMPANIES, 2.

STOCK AND STOCKHOLDERS.

CERTIFICATES OF STOCK.

1. *Negotiability of.* Certificates of stock are not negotiable either in form or character, and whoever takes them does so subject to the equities and burdens attached thereto. *George H. Hammond & Co. v. Hastings* (U. S.), 698.

INSPECTION OF BOOKS AND RECORDS.

2. Right of stockholders and officers to demand. *Hemingway v. Hemingway* (Conn.), 802.

LIEN.

3. Of corporation upon its stock, see 702, n.

STATUTORY LIABILITY FOR DEBTS OF CORPORATION.

4. *For failure to make report — whether penal — limitation.* Section 136, chapter 16, Compiled Statutes of Nebraska, which makes stockholders in a corporation liable for debts contracted by the corporation while its officers are in default in publishing an annual notice, stating "the amount of all existing debts of the corporation," is *quasi* penal, but is not a penalty, the evident purpose being to secure the rights of creditors, and an action to recover such debts is not barred by the statute of limitations in one year. *Howell et al. v. Roberts et al.* (Neb.), 365.

5. *Debts exceeding capital stock — whether penal — limitations.* An Illinois statute provides that if the indebtedness of any corporation shall exceed the amount of its capital stock the directors and officers assenting thereto "shall be personally and individually liable for such excess to the creditors of such corporation." Held, that the statute did not impose a penalty, and that an action thereunder was not barred within the time limited for the recovery of penalties. *Wolverton et al. v. George H. Taylor & Co. et al.* (Ill.), 369.

6. *Nature of the liability under the statute.* The liability under said statute is not absolute, but is only to be enforced to the extent that the corporation fails to pay its creditors, and is, therefore, in the nature of a security to the creditors of the corporation. *Ibid.*

7. *When action under statute accrues.* The action does not accrue immediately upon the officers' assenting to the excessive indebtedness, but only upon the maturing of the debt or some part thereof. *Ibid.*

8. *Limitation.* In this case, which was a bill in favor of the holders of a series of notes forming a part of such excessive indebtedness, it was held that the action did not accrue until the maturity of the first of said notes, and was not barred until the lapse of the statutory period from that time. *Ibid.*

9. *Until capital paid in and certificate filed — not penal — survival of actions.* A statute of New York provides as follows: "In limited liability companies all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed." Held, that the liability thereby created was in the nature of a contract liability and not of a penal nature, and consequently, that in case of the death of a stockholder, it would survive against his personal representatives. *Cochran et al. v. Weichers et al.* (N. Y.), 377.

STOCK AND STOCKHOLDERS—STATUTORY LIABILITY, ETC.—*Continued.*

10. *Statutes imposing liability are strictly construed.* The individual liability of a stockholder for the debt of the corporation depends entirely upon express provisions of statute law. There being no contract, express or implied, between him and the plaintiff, the statute is to be construed strictly. *Libbey v. Tobey (Me.)*, 381.

11. Where the remedy provided by statute exists only against those "who have subscribed for or agreed to take stock in said corporation, and have not paid for the same," etc., the statute contemplates a transaction or contract with the corporation in accepting, subscribing for, or agreeing to take stock, and not one between individuals in the purchase of stock in open market. *Ibid.*

12. *What stockholders liable.* The owners of the stock in an insolvent corporation, who are such at the commencement of a creditor's suit against its stockholders upon their individual liability, are liable for its debts; and this rule is not varied, in favor of a particular stockholder, by the fact that his stock may have been issued to him by the company after the creation of the debts. *Barrick v. Gifford (Ohio)*, 690.

13. *Foreign corporations.* Enforcing statutory liability in. 678, n.

14. *Whether such statutes are penal.* Question whether such statutes are penal considered at length in note. 381, n.

15. Statutes imposing liability as a necessary consequence of being a stockholder. 383, n.

16. For neglect or failure to make certain reports. 382, n.

17. For making a false report or certificate. 382, n.

18. For declaring a dividend when corporation insolvent. 382, n.

19. Making stockholders liable until capital paid in and certificate filed. 382, n.

20. Making officers or stockholders liable in case the debts exceed a certain amount. 383, n.

21. Criterion for determining whether such statutes are penal. 384, n.

22. Consequences of holding such statutes penal. 384, n.

SUBSCRIPTIONS.

23. *Parol condition.* When a subscriber to the stock of a corporation is sued on his written subscription, it is incompetent to prove an oral condition to the subscription. *Masonic Temple Association v. Channell (Minn.)*, 723.

24. *Whole stock must be subscribed before subscription payable.* The statute (§ 4, chap. 84, Gen. St. 1878) does not abrogate the common-law rule that, where the charter or articles of a corporation, or the terms of subscription to its capital stock, do not provide otherwise, payment of a subscription cannot be required till the whole capital stock is subscribed. *Ibid.*

25. *Waiver of this condition.* But the subscriber may waive that defense. Acts done by him, as stockholder or director, which constitute a part of the business for which the corporation is formed, and which from their nature assume it to be ready for business, and evince a willingness to enter upon that business, with the stock already subscribed, will amount to a waiver. *Ibid.*

26. *Incomplete subscription.* Suit by the receiver of an insolvent corporation to recover upon a stock subscription. The defendant subscribed the arti-

STOCK AND STOCKHOLDERS — SUBSCRIPTIONS — *Continued.*

cles of association which contained a subscription to the stock of the proposed company, but he did not acknowledge them. The statute required that the persons who desired to form a corporation, should make, sign and acknowledge a certificate setting forth certain things. The certificate in this case was acknowledged by only seven out of eighty-three subscribers. Held, that the defendant's subscription was not complete without acknowledgment, and that there could be no recovery against him. *Coppage v. Hutton (Ind.)*, 720.

27. *Same.* See generally, 722, n.

28. *Liability of subscribers to stock surrendered to corporation and sold by it.* When the subscribers for stock surrendered it to the corporation which sold it to others it was held that the original subscribers for the stock were not jointly liable with the purchasers thereof for the amount unpaid thereon, under a statute which made the assignor and assignee of stock jointly liable for the amount unpaid thereon, the said subscribers not being assignors of the stock. *Alling v. Ward (Ill.)*, 727.

29. *Call on directors when not a prerequisite.* Though the charter provides that all of the subscriptions over \$10 per share shall be payable on the call of the directors, yet where the subscriber has given demand notes for the amount unpaid he may be made amenable to the act. *Hill v. Merchants' Mutual Ins. Co. (U. S.)*, 682.

30. *What will discharge liability of stockholder.* To relieve a stockholder from liability for stock subscribed or agreed to be taken, payment therefor must be made *bona fide* in cash, or in some other matter or thing *bona fide* and fair valuation thereof. *Libbey v. Tobey (Me.)*, 281.

31. *Payment in property.* Payment of stock in any thing except money will not be regarded as payment except to the extent of the true value of the property received in lieu of money. *Ibid.*

32. *Suit by creditor against stockholder to recover amount unpaid on stock — requisites of suit.* When a judgment creditor of a corporation seeks to recover the amount of such judgment, or any part thereof, from a stockholder who has not fully paid for his stock, he must bring his case within the provisions of R. S., chapter 46, sections 46, 47, by showing: (1) A lawful and *bona fide* judgment recovered within two years next prior to his action against the stockholder. (2) That the defendant subscribed for, or agreed to take, stock in the corporation, and has not paid for the same as defined in section 45. (3) That his original cause of action was contracted during the defendant's ownership of such unpaid stock. (4) That the proceedings to obtain such judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the corporation books. *Libbey v. Tobey (Me.)*, 281.

TRANSFEREES.

33. *A purchaser of stock with notice is liable for unpaid installments.* A purchaser of stock assessable upon its face, or by the charter or by-laws of the corporation, and payable by installments, is liable for the amount remaining unpaid as if an original subscriber, and chargeable with notice of any such unpaid balances, whether purchased of the corporation or in open market. *Ibid.*

STOCK AND STOCKHOLDERS — TRANSFERREES — *Continued.*

34. *Liability of purchaser of stock issued as fully paid for property over valued.* The defendant having transferred all the stock subscribed for by him, except four hundred shares, prior to the date when the plaintiff's original cause of action against the corporation was contracted, is liable in this action only for the balance remaining unpaid upon those four hundred shares, and not upon the additional one thousand shares which he purchased in open market, and which were issued by the corporation as fully-paid stock. *Ibid.*

35. *Liability of purchasers of "treasury stock" issued as fully paid.* The subscribers to the stock of a corporation, before any thing was paid thereon, surrendered it to the corporation, and it was then sold to themselves and others at from five to twenty per cent of its face and issued as fully paid. The purchasers knew that the corporation only received for its stock the amounts which they severally paid. Held, that they were liable to creditors of the corporation for the difference between the par value of the stock and the amount paid therefor. *Alling et al. v. Ward et al. (Ill.), 727.*

36. *Liability of the purchasers of stock fictitiously issued as fully paid.* *Bona fide* purchasers without notice. 288, n.

37. Purchasers with notice. 291, n.

38. The questions of good faith and notice considered. 292, n.

39. Creditors having notice of the fictitious payment. 295.

See BOOKS AND RECORDS; DIRECTORS AND OFFICERS; LIEN; LIMITATIONS.

STREETS AND HIGHWAYS.

1. Abutting owners, rights of. 268, n, 750, n.

2. Snow and ice upon, whether a defect or want of repair. 213, n.

3. Width to be kept in repair. 59, n.

See EMINENT DOMAIN; RAILROADS; TELEGRAPH AND TELEPHONE COMPANIES.

STREET RAILWAYS.

1. *Right to adopt electricity as a motive power.* The charter of a street railway company provided that its road may be operated "with steam, horses or other power as the councils of said city and towns may from time to time direct." Held, that the use of electricity might be authorized even though the word "steam" should be stricken out as contended by counsel. *Taggart et al. v. Newport Street Railway Company (R. I.), 44.*

2. *Whether use of electricity is prohibited by act of incorporation.* The act provided that "said corporation shall not incur any portion of the streets or highways not occupied by said tracks." Held, that this did not prohibit the erection of poles and wires for the use of electricity. *Ibid.*

3. *Additional servitude.* A street railroad, whether operated by horse-power or electricity, is not an additional burden on the fee of the street for which the abutting owners are entitled to compensation. The same is true of the poles and wires erected for the application of electric power. *Ibid.*

4. Right to change to cable system or steam-power. 51, n.

5. Whether an additional burden on fee of street. 55, n.

SUBSCRIPTIONS.

See STOCK AND STOCKHOLDERS.

SUNDAY.

See MUNICIPAL CORPORATIONS, 12, 13.

SURFACE-WATER.

1. *Rights respecting.* If a private land-owner collects surface-water into a definite artificial channel and discharges it upon his neighbor's land he is liable to an action. The same would be true if the water was reflected upon the plaintiff's land by an obstacle in its direct course which such owner had set up, or negligently allowed to remain. Similar liabilities rest upon municipal corporations respecting their drains and sewers. *Bates v. Westborough (Mass.)*, 114.

TAXATION.

1. *Taxation of franchise or business — capital invested in United States bonds.* A statute of New York provided that all corporations, joint-stock companies and associations, with certain exceptions, should pay a tax upon their "corporate franchise or business," at the rate of one-fourth of a mill upon the capital stock, for each one per cent of dividends thereon, if the dividends amounted to six per cent or more, and fixing a different rate for those which paid less than six per cent or none at all. Held, that the tax was one upon the franchise or privilege of being a corporation and not upon the capital stock, and, therefore, that it was immaterial that a portion of the capital stock was invested in United States bonds not subject to state taxation. *Home Ins. Co. v. New York (U. S.)*, 490.

2. *Constitutional law — fourteenth amendment.* The statute in question is not obnoxious to the fourteenth amendment of the constitution of the United States, which declares that no state shall deprive any person of the equal protection of the laws. All corporations of the same kind are subject to the same tax. *Ibid.*

3. Taxation of corporations and corporate securities, see 490, n.

See INTERSTATE COMMERCE.

TELEGRAPH AND TELEPHONE COMPANIES.

1. *Telegraph line on highway — fee of highways in Virginia.* In Virginia, upon the establishment of a highway, the public acquire only an easement, and, in the absence of evidence to the contrary, the abutting owner is presumed to own to the middle of the way. *Western Union Tel. Company v. Williams (Va.)*, 258.

2. *Statutes should, if possible, be construed so as to be valid.* One section of a statute authorized telegraph lines to be constructed on state or county roads. Another section provided for making compensation to the owners of lands over which any telegraph line should be constructed. Held, that the act should be so construed, if possible, as to be in harmony with the constitution, and, therefore, that the section authorizing the use of highways for telegraphs should be construed to mean on condition of making compensation as provided in the subsequent section. *Ibid.*

3. An act which provides for taking private property for the use of a telegraph company without compensation is void. *Ibid.*

4. *Telegraph on highway additional burden.* The right of the public in a

TELEGRAPH AND TELEPHONE COMPANIES—*Continued.*

highway is one of passage only, and a telegraph line is an additional burden on the same, for which the owner is entitled to compensation. *Ibid.*

5. *Telegraph or telephone line in street.* Rights and remedies of abutting owner. 268, n.

NEGLECT IN REGARD TO MESSAGES.

6. *Error in transmitting messages.* One P. delivered a message to a telegraph company at its office at Papillion in this state, to be delivered to a person named at Kansas City, Missouri. The message as transmitted was incorrect, whereby P. lost a promised situation and sustained damages. Held, that the company was liable for the damages. *Kemp v. Western Union Telegraph Company (Neb.)*, 128.

7. *Statute defining liability and annulling exemption clause.* Section 12 of the act relating to telegraph companies makes such company "liable for the non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ," etc., and provides that it shall not be exempted from any such liability by reason of any "clause, condition or agreement contained in its printed blanks." *Ibid.*

8. Such requirements are reasonable, and are binding on all telegraph companies in the state. *Ibid.*

9. *Measure of damages.* Where a telegraph company undertakes to transmit a message correctly to another state, and fails to do so, it is liable for a breach of its contract, and the party injured may recover all the damages which he sustains by reason of such breach. *Ibid.*

10. *Mistake in transmitting message—damages.* When goods ordered by telegraph were sent to the wrong place, in consequence of an error of the company in repeating the dispatch at an intermediate point, and sending it forward, the measure of damages is not the full value of the goods at the place to which they should have been sent, with no deduction for their value at the place to which they were actually sent. A person injured by the negligent act of another must use reasonable diligence to render the damage as little as practicable, after discovery of the negligence and its probable consequences. *Western Union Tel. Co. v. Reid et al. (Ga.)*, 491.

11. A telegraph company will not be liable for a failure to deliver an oral message in the absence of evidence of its custom to do so. *Western Union Tel. Co. v. Dozier (Miss.)*, 133 n.

12. Plaintiff operated a saw-mill, and having broken their saw, engaged S., of the firm of G. & S., to order them one from St. Louis, by telegraph. S. wrote out a message to the C. & B. Hardware Co., of St. Louis, ordering them to ship a saw of the kind desired to G. & S., and gave the same with money to pay charges to a traveling salesman of the hardware company who, instead of using the message written by S., wrote a new one of similar import, signed his own name thereto and delivered it to the operator. The message was not delivered to the hardware company. It was held that the salesman was not acting as the agent of S. or plaintiffs in sending the message he did, and that plaintiff, consequently, could not recover either the cost of sending the message or damages for the delay. *Elliott v. Western Union Tel. Co. (Tex.)*, 133, n.

13. There can be no recovery against a telegraph company for a failure to

TELEGRAPH AND TELEPHONE COMPANIES—NEGLIGENCE, ETC.—*Conf'd*
 deliver a message promptly unless such failure is due to the negligence of the company. *Thompson v. Western Union Tel. Co. (N. C.), 133, n.*

14. Plaintiff resided at H. with his wife. Her father was on his death bed at G. A relative of the family sent a message to plaintiff as follows: "Come on first train. Bring Ferdinand. His father very low." Ferdinand was a brother of the plaintiff's wife. By reason of delay in the delivery of the message plaintiff's wife did not reach her father until after his death. In a suit by plaintiff to recover for the mental suffering of his wife in not being with her father in his last moments, it was held that there could be no recovery for the reason that the message gave no intimation that it was for the benefit of the wife, and no explanation was made to the agent to whom it was delivered. The fact that the agent at H. knew that the plaintiff had a wife and that the message related to her father would make no difference. *Western Union Tel. Co. v. Kirkpatrick (Tex.), 133, n.*

15. S. brought suit against a telegraph company for negligence in delivering a message to R. as follows: "Meet me in Columbus Saturday night." In consequence of a failure to deliver the message R. was not in Columbus at the appointed time and plaintiff was obliged to travel a long distance to find him, and he sought to recover for loss of time, expense, exposure, etc. The court held that there could be no recovery and dismissed the suit. *Western Union Tel. Co. v. Smith (Tex.), 134, n.*

16. Where a message, legibly written, is delivered to an operator, who called the agent at the receiving station and informed him of the number of words in the message, sent the message and received a reply indicating that the message had been received with the requisite number of words, but, in fact, the message as delivered by the receiving agent, omitted two words, it was held the company was guilty of gross negligence, and was liable for the damages resulting from the mistake, notwithstanding a stipulation in the blank used, that the company would not be liable for mistakes or delays in sending unrepeat messages, except in case of gross negligence. *Western Union Tel. Co. v. Goodbar (Miss.), 134, n.*

17. Plaintiff, in answer to a letter from C., telegraphed him to purchase property, and if the message had been promptly delivered he would have secured for \$8,000 property worth \$5,000. C. had written a similar letter to S., apparently residing at the same place as plaintiff, and S. had telegraphed C. to buy the same property. C. received the message of S. first, and the latter secured the property. The message of S. was delivered to the company for transmission an hour before the plaintiff's, but if plaintiff's message had been promptly delivered it would have reached C. before that of S. did in fact, although if both had been promptly delivered S. would have been ahead. It was held that if the delay of the plaintiff's message was the result of negligence, the company was liable for whatever loss the plaintiff sustained, and that the company could not excuse itself by showing that if S.'s message had been promptly delivered, which was not the fact, the plaintiff could not have secured the property. *Alexander v. Western Union Tel. Co. (Miss.), 134, n.*

TELEPHONE COMPANIES.

18. *Duties — mandamus.* Under the laws of Indiana a telephone company

TELEGRAPH AND TELEPHONE COMPANIES—TELEPHONE Co.'s—*Cont'd.*
may be compelled by *mandamus* to furnish an instrument and telephone service upon demand and tender of the statutory compensation. Central Union Telephone Co. v. State, ex rel., etc. (Ind.), 406.

TRAVELER.

ULTRA VIRES.

1. *Estoppel to plead ultra vires.* A corporation, which has enjoyed the benefit of a contract, cannot plead that it was *ultra vires*, where no fraud is intended or has been committed. Sherman Center Town Co. v. Morris (Kans.), 399.

WAREHOUSES.

1. Regulating charges of. 585, n.



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